No. 14,424

IN THE

United States Court of Appeals

For the Ninth Circuit

CASH COLE, et al.,
Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,
Appellees.

On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

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On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

Appellants' "Statement of Case" is deficient in the following, among other things: (a) It fails to comply with rule 24 in failing to present succinctly the question involved in this appeal, and to list and specify assigned errors on which appellants intend to rely. (b) It is incomplete as to proceedings and facts resulting in the question before this court on appeal. (c) It fails to show the controverted facts. (d) It fails to cite frequently reference to the transcript. (e) It fails to distinguish clearly between matters arising prior to the final decree and order entered October 10, 1953, matters arising subsequent thereto,

and matters arising on and after May 7, 1954 when appellants' motion to vacate judgment was denied. Rather than pointing out specifically these deficiencies, and attempting to remedy them piecemeal, a more complete statement of the case will be made for the convenience of the court, and to avoid the necessity of constant reference between the briefs of the parties.

STATEMENT AS TO PLEADINGS AND PROCEEDINGS.

Nature of case.

This was in the nature of a stockholders' suit.

Complaint.

A complaint was filed by the appellee corporation and owners (plaintiffs in the trial court) of 50 percent of its common stock to secure appointment of a receiver and an accounting from the appellants Cash Cole, Everett Nowell and Bayview Realty, Inc., (defendants in the trial court) and, if necessary, to wind up said corporation for the following reasons, among others: Existence of an impasse in the conduct of its corporate affairs due to deadlock and dissension in the Board of Directors and among the stockholders; dissension and discord as to who, in fact, comprise the directorate; improper disposition and misappropriation of corporate funds; dissipation of corporate assets; impairment of corporate property; and usurpation of control and possession of corporate assets, income and profits by the appellants, owners of the other 50 percent of the common stock, and

exercise by them of corporate powers without the authority of the Board of Directors and the stockholders, contrary to the provisions of the corporate charter, by-laws and the General Laws of the Territory of Alaska. (TR 3-15.)

Answer.

The principal appellants, Cash Cole (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.), Everett Nowell (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.), and Bayview Realty, Inc., filed an answer in the nature of a general denial. (TR 15-20.)

Application for receiver pendente lite.

A motion for appointment of receiver was filed pendente lite on June 25, 1953. (TR 278-280.) Affidavits in support of said motion and a motion for temporary injunction were filed by appellees. (TR 280-287, 304-313, 314-316, 317-329, 329-359, 360-368.) Affidavits in opposition were filed by appellants. (TR 21-38, 288-289, 290-294, 295-299, 300-304.) Although a hearing was had on these motions prior to trial, a receiver was not appointed pendente lite without prejudice to a renewal of said motion.

Trial and settlement negotiations.

The trial commenced on October 5, 1953, and continued during that day, including the taking of the testimony of Cash Cole on direct examination as an adverse witness for the appellees. (TR 424-535.) That evening he purportedly suffered a heart attack

(TR 536), and the trial was continued from day to day until the entry of the final judgment, except for the taking of the testimony of Arnoldine Scott. (TR 549-569.) Negotiations at the suggestion of Cash Cole's attorneys (TR 71) were immediately undertaken for the purpose of settling the various claims of the parties involved in this case, other pending litigation between them (see *infra,* par. 10), and the case filed by A. G. Rushlight & Co., No. 7163, to foreclose its mechanics' lien against Fairview Manor. (See *infra,* par. 9.)

Receiver.

On October 8, 1953, Robert E. Sheldon was appointed as receiver in this cause for the Fairview Manor and all the assets of the corporate appellee, in view of the lack of any settlement on that date, the probable indefinite continuance of the trial, and the purported illness of Cash Cole. (TR 542-547; order, 368-370.)

Compromise and final decree and order.

A written stipulation settling all claims of the parties in this case was executed by them October 9, 1953, providing, among other things: (a) For sale of the common stock owned by the Mortensens and Henderson to Cash Cole; (b) release of all claims against Cash Cole, and Fairview Development, Inc., by the Mortensens and Henderson in consideration of the payment of $89,000.00 by Fairview Development, Inc., payable $6,800.00 at the time of execution, $3,200.00 on December 31, 1953, and thereafter $5,000.00 quarter

annually; (c) security for performance by said Fairview Development, Inc., of said agreement to pay by deposit in escrow of all common stock then owned or acquired through the settlement by Cash Cole, Everett Nowell, and Bayview Realty Company, such stock in the event of default to become the property of Mortensens and Henderson in satisfaction of said sum of $89,000.00; (d) payment by Mortensens and Henderson to Nowell of a claim of $6,800.00, and dismissal of litigation involving said claim; (e) assumption by Mortensens and Henderson of responsibility for claims of mechanic's liens by A. G. Rushlight and Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton involved in above mentioned case No. 7163; (f) release to Mortensens and Henderson of approximately $8,800.00 held on deposit at the National Bank of Commerce in Seattle; (g) dismissal of all pending litigation with prejudice; (h) resignation of Mortensens and Henderson as officers and directors; (i) agreement for no change in the corporate articles of the appellee corporation, or incurrence of any unusual debts until payment of said sum of $89,000.00; (j) approval of the stipulation by court; (k) and execution of such other documents as might be subsequently required to consummate terms of said settlement. (TR 38-44.) At the same time a separate settlement agreement was made with A. G. Rushlight & Co., of its claim in case No. 7163, and filed in the form of a stipulation providing for payment of $125,000.00 by Mortensens and Henderson to said claimant. (TR 75, 76, 93.) A final judgment approving the settlement filed in this cause was entered

on October 10, 1953, by the trial court and provided for discharge of the receiver and the carrying out of the terms and provisions of the agreement contained in said stipulation. (TR 45-46.)

Withdrawal of attorneys.

Cake, Jaureguy & Hardy, theretofore one of the firms representing appellants, filed notice of withdrawal on December 17, 1953. (TR 371.)

Motion to set aside stipulation and vacate judgment.

On January 8, 1954, the appellants, Cash Cole and Bayview Realty, Inc., by their present counsel, filed a motion to set aside said stipulation and vacate said judgment under Rule 60 (b) of the *Federal Rules of Civil Procedure* upon the following grounds: (a) Fraud; (b) inability "to properly think" or "comprehend" of Cash Cole as a result of heart attack; (c) mistake, inadvertence, surprise, excusable neglect; (d) conspiracy to defraud by the Mortensens, Henderson, Nowell, and W. A. Rushlight; (e) stipulation and decree is unconscionable, impossible of performance and confiscatory; (f) no authority by boards of directors or stockholders to execute stipulation; (g) separate agreements made with Nowell and Rushlight were without consideration; and (h) no ratification of stipulation by Cash Cole. (TR 52-56.) In support of said motion various affidavits were filed by appellant Cash Cole, and by Tom Cole and Mrs. Ruth Cole; and affidavits were filed by appellees generally denying assertions contained in latter. These affidavits are hereafter considered.

Appellees' motions to show cause and for appointment of receiver.

On February 13, 1954, the individual appellees moved for the entry of an order directing the appellants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of the final decree entered October 10, 1953, and the settlement agreement evidenced by the stipulation filed October 9, 1953, and for failure to deliver the capital stock of appellee corporation as provided in said decree and stipulation, or in the alternative that an order be entered directing them to assign and deliver the certificates evidencing said stock to the Mortensens and Henderson. (TR 373-374.) An amended motion was likewise filed March 19, 1954 for reinstatement of Robert E. Sheldon as receiver in this case or for appointment of some other disinterested person as receiver to take over the management of Fairview Manor Apartments and the assets of appellee corporation, until said appellants had complied with the terms and provisions of said final decree and stipulation. (TR 183-187.) Affidavits in opposition to appellants' motion to vacate the final decree and in support of the motions to show cause and for appointment of receiver were filed by appellees Cliff Mortensen and Frank V. Henderson, and by Joe Diamond, Earle Zinn, Everett Nowell, W. A. Rushlight, and Dr. Joseph M. Ribar, and are hereafter considered together with affidavits filed in response thereto.

Notice of default and demand.

Said notice dated February 9, 1954, and filed on February 13, 1954 was served on appellants, showing their defaults under the settlement agreement, and termination of ownership thereby in stock pledged as security. (TR 371-373.)

Order denying motion to vacate.

The court considered appellants' motion to set aside said stipulation and vacate the final decree on the above mentioned affidavits and proceedings had in this case, and oral arguments of counsel for the respective parties. The matter was taken under advisement and thereafter findings of fact and conclusions of law were entered and filed by the court on May 7, 1954 (TR 228-252), and an order entered denying appellants' motion to vacate the final judgment, appointing a receiver, and directing delivery of the certificates of stock theretofore owned by the appellants to the individual appellees. (TR 252-258.)

Notice of appeal.

A notice of appeal was filed by the appellants Cash Cole, individually, and as an officer and director of Bayview Realty, Inc., and Bayview Realty, Inc., from the final judgment, and from the order over-ruling appellants' motion to set aside and vacate said final judgment. (TR 264.) An effort was made to include Fairview Development, Inc. as a party to said notice of appeal, but upon motion of appellees (TR 401-402) the name of said Fairview Development, Inc. was stricken by the trial court from said notice. (TR 266.)

STATEMENT OF CASE.

It is desirable to consider first, the facts and circumstances surrounding the appellants' motion to set aside the compromise agreement of October 9, 1953 and to vacate the final decree and order entered October 10, 1953, which is the only substantial matter involved in the sole issue before this court, hereinafter noted; and secondly, to note briefly the facts in dispute involved in this case leading up to said compromise agreement and final decree and order, which are not actually involved in the question now before this court.

A. CIRCUMSTANCES SURROUNDING THE COMPROMISE AGREEMENT AND SUBSEQUENT EVENTS.

1. Settlement negotiations.

Negotiations to compromise the conflicting claims of the parties involved in this cause, as well as the claim of A. G. Rushlight & Co., were undertaken at the suggestion of Nicholas Jaureguy, attorney for Cash Cole, and W. A. Rushlight, immediately after the trial was continued on October 6, 1953. (Mortensen, TR 71; Henderson, TR 87, par. 2; Diamond and Zinn, TR 93, par. 2; Rushlight, TR 166-167; Nowell, TR 97-98, 235-236.) Cash Cole himself indicated that he desired a settlement. (TR 154, 163, 167-168.) The following persons participated in said negotiations directly: Nicholas Jaureguy, attorney for Cash Cole; John E. Hedrick, attorney for Nowell; W. A. Rushlight; the appellants Cliff Mortensen

and Frank Henderson, and their attorneys, Joe Diamond, Earle Zinn and Walter Sczudlo. Cash Cole was kept posted on the nature of these negotiations through his attorney Jaureguy and Rushlight. (TR 166-170, 134, 71-75; TR 87, par. 2; TR 93, par. 2; TR 235-236.) Several compromise plans were considered, containing the basic provisions embodied in the ultimate settlement evidenced by the stipulation filed in this cause on October 9, 1953. (TR 166-170, 97-99; TR 71-75; TR 87, par. 2; TR 93, par. 2; TR 140-141.)

Cash Cole denied that his attorney, Jaureguy, made the settlement, but states that Cake made such settlement (TR 157, 162); and further states that he did not talk to his attorney during these negotiations. (TR 60, 135.) Yet it appears in the record in this case and from his own admissions that Cake and Jaureguy of the firm of Cake, Jaureguy and Hardy, represented him in this case at the time of these negotiations. (TR 143.) Tom Cole, however, contradicts him and admits that he conferred with Rushlight and Jaureguy regarding the terms of the final settlement prior to its execution. (TR 134.) Others participating in these negotiations have sworn that Cash Cole was advised of the progress and nature of these negotiations and talked to his attorney Jaureguy, and to Rushlight. (TR 166-170; 97-99, 71-75; TR 87, par. 2; TR 93, par 2.)

2. Reciprocal offer.

The several compromise plans considered during the negotiations were reciprocal in nature in that the Mortensens and Henderson were willing "to buy or

sell'' on the same terms and conditions, that is, to buy out the interests of the principal appellants in the appellee corporation and settle all conflicting claims, or to sell their interests in said corporation to the principal appellants and to settle all conflicting claims. (TR 140-141, 166-167, 71-73, 74-75; TR 87, par. 2; TR 93, par. 2; TR 237.) The final compromise evidenced by the stipulation filed October 9, 1953, in this case, was a similar ''to buy or sell'' offer, which Cash Cole elected to accept as a buyer.

3. Cole's capacity to do business.

Dr. Joseph M. Ribar was the only physician attending Cash Cole following his purported heart attack at the end of the first day of the trial. The doctor merely stated that at no time within one week after said attack was Cash Cole in a proper physical or mental condition to transact business matters, and admitted that he was unable to state as to whether Cole was mentally competent to transact any business matters after the expiration of 72 hours following his attack, that is, after October 7, 1954, since the patient was not examined to determine his mental competency. (TR 64-65, 94, 238.) Rushlight states in his affidavit (TR 170) that Cash Cole was fully aware of what was going on and understood each and every matter contained in the stipulation and all ancillary matters. He further states that he was advised of the progress of the negotiation and terms of the compromise plan not only by himself but likewise by his attorney Jaureguy. (TR 166-170, 71-75, 81-82.)

The affidavits submitted on behalf of appellants Cash Cole and the Bayview Realty, Inc., to vacate the decree contained conflicting statements with respect to his comprehension and capacity. Cash Cole, in his affidavit (TR 58), states that he did not ascertain the intent and import of said stipulation until about one month after the execution thereof. Tom Cole in his affidavit (TR 134-135) states, on the other hand, that it was "several days after the agreements and notes were signed" before Cash Cole ascertained the nature thereof. Ruth Cole in her affidavit (TR 141) states that Rushlight discussed with Cash Cole for "several days" the settlement negotiations, but in a subsequent paragraph states that it was "several weeks" after the stipulation was signed before he knew what it contained. Cash Cole swears in his affidavit (TR 58) that he was unable to read the stipulation for a period of one month after he signed it, because of the drugs administered to him. Dr. Ribar, however, states that the effect of said drugs was limited to approximately 72 hours after their administration, and that such effect would not continue for one month. (TR 94-95, 238.) Tom Cole admits in his affidavit (TR 137) that Cole could read after a week. It is noteworthy that in appellants' motion to set aside the compromise agreement and vacate the final decree (TR 52-56), and the various affidavits filed in support thereof there is no categorical statement or proof that Cash Cole was mentally incompetent to conduct the compromise negotiations, or to execute the compromise agreement contained in the stipulation. Rather, it is represented that he was

unable to read and was ill. Cash Cole in his first affidavit admits that he "relied upon the statements" of Rushlight as to the contents of the compromise agreement, and does not state that he did not comprehend such contents, or that he was mentally incompetent, but rather represents that Rushlight made false and fraudulent representations as to said contents. (TR 57.) There is nothing contained in said affidavit or in subsequent affidavits filed by Cash Cole (TR 143, 156) in which there is any indication that he did not discuss the terms and provisions of the settlement agreement before it was signed by him and by his attorney, Jaureguy.

4. Understanding of settlement by Cole family.

Cash Cole contends that his wife and Tom Cole were uninformed of the matters discussed and the final stipulation. (TR 60.) In his later affidavit he points out discussions between Tom Cole and W. A. Rushlight in which familiarity with the terms of the stipulation are shown by the former. (TR 157.) Tom Cole denied participation in the negotiations, but admitted that he talked to W. A. Rushlight and to Jaureguy, attorney for Cole, about the final settlement agreement. (TR 134.) He does not deny in his affidavits lack of knowledge as to the terms and conditions of the final settlement represented in the stipulation. (TR 61-64, 132-139.) Ruth Cole denies participation in the negotiations, but does not deny knowledge of the final settlement terms, but rather indicates that she did possess such knowledge. (TR 140-141.) Appellees' affidavits do not contain any

such conflicting representations, but unequivocally state that both Mrs. Cole and Tom Cole, as well as their attorney Jaureguy and W. A. Rushlight, had full knowledge of all of the negotiations and especially the terms and conditions of the final compromise plan embodied in the stipulation, which appellants sought to set aside. (TR 170, 71-73, 80-81; TR 87, par. 2; 237-238.)

5. Conspiracy and fraud.

In support of the motion seeking to vacate the final judgment on the ground of fraud and conspiracy, the principal appellants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions (TR 239-240) as follows: That appellees "acting in concert with one W. A. Rushlight" induced him to sign the stipulation, when he did not know the contents thereof (TR 57); that he relied on a false and fraudulent statement as to the contents of said stipulation made by "A. G. Rushlight Co." (TR 57); that he "believes" that the Mortensens, Henderson, Rushlight, and Nowell conspired to secure his stock in the appellee corporation knowing that he could not make the payments provided in the stipulation, demand note and agreement (apparently the demand note was the one to Rushlight and the agreement was the one with Nowell, neither of which had any place in the stipulation involved in this cause) (TR 59); that Mortensen, Henderson and Nowell, acting in concert with Rushlight began negotiations with Cash Cole to sell *their stock* to Cole (TR 62); that it was evident to Cash Cole that the "plaintiffs

had concocted a scheme'' to secure not only the profits from contracts of construction, but also over $1,000,000.00 by failing to do the work, etc., (TR 148); and that reading of Nowell's letter of May 24, 1951 criticizing actions of Cash Cole, made it clear to him that Nowell's responsibilities as a director in Bayview Realty, Inc., and Fairview Development, Inc., were secondary to his personal affairs. (TR 151-152.)

On the other hand Cole admits in contradiction to the existence of a conspiracy in which Nowell participated that Nowell filed a suit seeking damages in the sum of $690,000.00 against the Mortensens and Henderson in Seattle, to improve ''bargaining'' position against said appellees. (TR 143-144, 154.)

The other parties to the negotiations deny any such conspiracy, fraud, or other charges and in their affidavits set up the ultimate facts leading up to the settlement and stipulation. (TR 166, 170, 95-100, 80-81; TR 87, par. 2, 3; TR 93, par. 2; TR 240-241.)

It is noteworthy to consider the number of parties to this cause and their counsel involved in the negotiations. Such counsel Cole implies or charges were parties to fraud or conspiracy. The negotiations for settlement were conducted by Nicholas Jaureguy, as attorney for Cash Cole and Bayview Realty, Inc.; John Hedrick, attorney for Everett Nowell; W. A. Rushlight, acting as representative for A. G. Rushlight & Co.; Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, and Fairview Devel-

opment, Inc., and other appellees. The following attorneys appeared of record for the appellants at the time of the trial and negotiations: Cake, Jaureguy & Hardy of Portland; Morrissey, Hedrick, Roberts & Dunham of Seattle; and J. Hellenthal of Anchorage. These several attorneys represented independent of each other the respective conflictive claims of the parties to this cause and conducted personally the negotiations. Nowell, Mortensen and Henderson personally participated in said negotiations. Cash Cole participated in them through his attorney, Jaureguy, and said Rushlight, and the various compromise plans were submitted from time to time to him personally. (TR 80, 98-99, 174, 166-169, 87; TR 93, par. 2; TR 235-236.)

Jaureguy, Cash Cole, and Rushlight gave careful consideration to the compromise plan for the purpose of: Purchasing the interests of the Mortensens and Henderson so as to gain control of Fairview Development, Inc., and Fairview Manor; settling the various claims of said parties against each other; securing the discharge of Robert E. Sheldon, receiver then recently appointed in this case; securing dismissal of other litigation pending between these parties; avoiding further trial in this case; and securing payment of the claims of lien of A. G. Rushlight & Co., Pilip and Butt Painting Contractors, Inc., and C. H. Keaton. (TR 81, 166-169, 236.) The interests of these various groups in this case were adverse to each other, and each group personally or through its attorneys, conducted the negotiations independently for its own

benefit, without misrepresentation, or opportunity for fraud, or attempt to overreach Cash Cole or any other parties involved for its own advantage, since all phases of said negotiations and proposed settlement were known to each of said groups, and to Cash Cole, his son, his wife, and Jaureguy, his attorney, who had full possession of all the facts and all of the corporate books of Fairview Development, Inc., during this entire period. (TR 80-81, 71-75; TR 87, par. 2; TR 166-170, 97-100, 181-182, 236-237.)

At all times the Mortensens and Henderson were willing to buy the interests of the principal appellants and settle all claims on the same terms and conditions as those contained in the final settlement agreement contained in the stipulation. (TR 167, 140-141, 71-73, 74-75, 237.) Cash Cole, however, would not sell but insisted on buying. (TR 167.)

6. Tenants antagonized—vacancies.

Cash Cole and his management had antagonized tenants at Fairview Manor. He had been arbitrary in his conduct toward them, resulting in many unnecessary vacancies and loss of income to the appellee corporation. (TR 88.) Tom Cole denied any such fact, but admitted that there were lease difficulties, and so did Cash Cole. (TR 137-138, 158.) The exact number of vacancies were admitted by Cash Cole to average from 55 to 71 apartments during the winter, with 71 vacancies on February 1, 1954. (TR 158, 145, 146, 155, 138.) Estimating the rental to be only $115.00 per apartment that would range from

$6,325.00 to $8,165.00 *loss in income each month.* (TR 192-193.)

7. No impossibility of performing settlement agreement.

Cash Cole admits that the reason for failure to perform the settlement agreement and make the payments required thereunder was due to the 55 or more vacancies since November, 1953. (TR 158, 241.) Apparently this is the only reason for the statement in the motion to vacate the judgment and in the affidavit of Cash Cole (TR 53-54, 58-59, 241) that said settlement agreement was impossible to fulfill, and so was confiscatory or in the nature of a forfeiture of his interests. Tom Cole ties in the alleged impossibility of performing the stipulation involved in this case with the separate agreements made between Cash Cole, Nowell, and Rushlight, which were not involved in said stipulation, to which the appellees were not parties, and which had no part in this cause. (TR 134-135, 241.)

8. Ratification.

Cash Cole accepted the benefits of the performance of the terms and conditions of the settlement agreement by the Mortensens and Henderson resulting in the dismissal of various litigation hereinafter mentioned, payment by them of $125,000.00 to A. G. Rushlight & Co., in case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Painting Contractors, Inc., and release and settlement of other conflicting claims. No restitution had been offered by Cash Cole and Bayview Realty, Inc.,

or others in their behalf, to place the parties in the same position as they were at the time of the filing of said stipulation on October 9, 1953. (TR 85; TR 87, par. 2; TR 92, par. 2; TR 100, 172-176, 241.) Cash Cole had accepted as a fact the resignations of Mortensen and Henderson from the board of directors of appellee corporation in accordance with said stipulation and had placed Tom Cole and one other person on said board. He had also taken over the assets of Bayview Realty, Inc., and other benefits secured from the performance apparently by Nowell of his separate agreement with Cash Cole. (TR 100.)

COLE SOUGHT BENEFITS WITHOUT PERFORMING HIMSELF.

9. Mechanic's liens.

The following claims of mechanic's and materialman's liens had been filed, and foreclosure thereof was sought in case No. 7163, filed against Fairview Development, Inc., Nelse Mortensen-Alaska, Inc., and others, by A. G. Rushlight and Co.:

(a) A. G. Rushlight and Co., Inc.—Claim, $344,973.30; attorneys' fees, $35,000.00; and costs.

(b) Pilip & Butt Painting Contractors, Inc.—claim $77,681.62, and interest accrued thereon; attorneys' fees, $5,000.00; and costs.

(c) C. H. Keaton, d/b/a Keaton Paint Co.—claim $17,349.44 and interest accrued thereon; attorneys' fees, $2,000.00; and costs.

W. A. Rushlight would enter into no settlement of said Rushlight lien unless a settlement was likewise made with Cash Cole on terms and conditions

acceptable to said Cash Cole. (TR 87, 71-75; TR 92, par. 2; TR 242.) The stipulation filed in the subject case provided for assumption by the Mortensens and Henderson of said liens. Simultaneously with the filing of said stipulation, a stipulation was likewise filed in case No. 7163 in the trial court by the Rushlight Company and Mortensens and Henderson agreeing to the payment of $125,000.00 in settlement of the Rushlight lien. Payment was thereafter made and an order was entered on November 20, 1953, dismissing the amended complaint of the Rushlight Company. On February 16, 1954, a stipulation was filed wherein Pilip & Butt Painting Contractors, Inc. certified to the settlement and payment of its claim and an order was entered on that date dismissing the cross-complaint of said claimant in said case.

Cash Cole (TR 156), however, denies that the Rushlight settlement hinged on his settlement, but admits that the $125,000.00 was paid. He further states that no guaranty was given by Mortensens and Henderson as to payment of said liens prior to said settlement, and apparently this was of grave concern to him. (TR 151.) He was familiar, however, with the fact that these liens represented claims by subcontractors for work performed beyond that called for by the plans and specifications, and that $478,000.00 was deposited in escrow by the Mortensens and Henderson to protect Fairview Development, Inc. as to payment of said liens in the event of foreclosure. (TR 151, 179-180, 313.) In contradiction to Cash Cole, Tom Cole states that the Rushlight lien was of no concern to Fairview Development, Inc. (TR 136.)

10. Litigation.

At the time of the trial, settlement and final decree in this case the following additional litigation was pending and subsequently settled by reason of said stipulation and performance thereof by the Mortensens and Henderson:

(a) *A. G. Rushlight and Co., a corporation, v. Nelse Mortensen-Alaska, Inc., a corporation, Fair-View Development, Inc., et al,* No. 7163, foreclosure proceedings above mentioned.

(b) *Nelse Mortensen-Alaska, Inc., a corporation, et al, v. A. G. Rushlight and Co., a corporation,* No. 3105, in the District Court of the United States for the Western District of Washington, Northern Division, to set aside mechanic's lien above mentioned, and for damages for failure to perform subcontractor's contract properly.

(c) *Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners, d/b/a Nelse Mortensen-Alaska Co., et al, v. Pilip & Butt, Inc., a corporation, et al,* No. 44280, in the Superior Court of the State of Washington for King County, to set aside mechanic's lien above mentioned, and for damages for breach of subcontractor's contract.

(d) *Fairview Development, Inc., a corporation, v. Nelse Mortensen-Alaska, Inc.,* No. 3532, in the District Court of the United States for the Western District of Washington, Northern Division, for damages in the sum of $699,912.27 sought against the Mortensen Construction Company, based upon exaggerated and groundless claims, where actually the amount

in dispute did not exceed the maximum sum of $20,000.00. (TR 69-70, 321-324, 154, 172-176, 177-180, 243.)

11. Delivery of stock.

The settlement agreement contained in the stipulation (TR 38, par. 2; TR 41, par. 9) provided that all of the capital stock of Fairview Development, Inc. (except the 100 shares of preferred stock), consisting of 450 shares purchased by said Cash Cole, Nowell and/or Bayview Realty, Inc. from the Mortensens and Henderson under said agreement, and the 450 shares of stock owned by Bayview Realty, Inc. would be placed in escrow, as security for the payment of the sum of $89,000.00 to the Mortensens and Henderson undertaken by Fairview Development, Inc. It was understood under said settlement agreement that all of said voting stock would remain in escrow so that in the event of any default the Mortensens and Henderson would be entitled to all of said stock as their own property, except said 100 shares of preferred stock. Cash Cole, Nowell and Bayview Realty, Inc. failed to deliver said stock in escrow for the purposes of said security. (TR 76-78; TR 87, par. 2; TR 93, par. 2; TR 371-373, 244.) Cash Cole and Tom Cole in contradiction to the specific provisions of the settlement agreement contend that the capital stock of Mortensens and Henderson covered by the settlement agreement should have been turned over to Cash Cole, as well as stock purportedly owned by Nowell (TR 152-153, 174-175, 136.)

12. Performance by Mortensens and Henderson.

Nelse Mortensen, Cliff Mortensen and Frank Henderson have fully performed all the terms and conditions of the settlement agreement, including: (a) Payment of $125,000.00 to A. G. Rushlight & Co. in settlement of its claim in case No. 7163; (b) dismissal on November 20, 1953 of the Rushlight amended complaint; (c) settlement of the claim of Pilip & Butt Painting Contractors, Inc., and payment thereof; (d) making provision for defending against the claim of C. H. Keaton without cost to Fairview Development, Inc.; (e) securing dismissal of other suits pending in the State of Washington hereinabove mentioned; and (f) payment to Nowell of $6,800.00 under stipulation (TR 40; TR 76, par. 12; TR 87, par. 2; TR 93, par. 2; 244-245.) Payment of said $125,000.00 (TR 136), resignation of Mortensen and Henderson as directors "as per the stipulation" (TR 153-154) was admitted by Cash Cole, and there was no denial by him of the performance by the Mortensens and Henderson of the other conditions above mentioned.

13. Performance by Nowell.

Nowell (defendant in the trial court) had apparently performed the terms and conditions of the separate agreement existing between him and Cash Cole, which included the delivery of all of the capital stock owned by him of Bayview Realty, Inc. to Cash Cole, as well as turning over the minutes of West Juneau, Inc., and Gastineau Utility, Inc. (TR 99-100, 174-176.) Cash Cole, however, had defaulted under said agree-

ment. This, of course, presented no issue in this case, since it was not a part of the settlement agreement contained in the stipulation involved herein. (TR 245, par. 21.)

14. Defaults by appellants.

Bayview Realty, Inc., Cash Cole and Nowell had defaulted under the compromise agreement in the performance of the terms and conditions thereof, including: (a) failure to deposit all the capital stock of Fairview Development, Inc. (except 100 shares of preferred stock) aggregating 900 shares theretofore owned by said appellants, or one or more of them, or acquired under the terms of the settlement agreement, as security for the payment of the obligation of $89,000.00 undertaken by Fairview Development, Inc.; (b) failure to pay $6,800.00 at time of execution of settlement agreement and stipulation; (c) failure to pay $3,200.00 on or before December 31, 1953; (d) refusal to permit Fairview Development, Inc. to pay said sum of $89,000.00, the maturity of which was accelerated by the Notice of Default and Demand, (TR 371-373), dated February 9, 1954. (TR 76-78; TR 87, par. 2; TR 92, par. 2; TR 38, par. 2, 9, 11; TR 245, par. 20.)

IRRELEVANT MATTERS RAISED BY APPELLANTS.

The trial court pointed out in its order, (TR 245, par. 21) denying appellants' motion to vacate the final decree, that the parties in their affidavits in support and in opposition to said motion made reference to various irrelevant matters with respect to the in-

come of Fairview Manor Apartments, the appellees' knowledge concerning the financial condition of said project, the separate negotiations and settlement made between the appellants, Cash Cole and Everett Nowell, the execution by Cash Cole of a note in apparently the sum of $25,000.00 to Rushlight and the business transactions between the appellant, Cash Cole and Everett Nowell, all of which the trial court considered as immaterial to the issues raised by said motion to vacate. The evidence concerning the said matters is summarized in the following paragraph 15, et seq., only to show the facts as disclosed by the proof with respect to these matters, since indiscriminate reference is made to them throughout the argument of the appellants in their brief, and to contradict their apparent effort by reference to these matters to picture Cash Cole as an innocent victim of some "scheme" to defraud him, and actually to disclose the ruthless, high-handed and selfish manner in which he dealt with the assets and income of the appellee corporation for his own benefit and use, and to show that his impassioned prayer for the equitable consideration of this Court is not only improper and not directed to the issues involved before this Court, but is not well founded.

15. Income.

Cash Cole sets out the income of Fairview Manor Apartments and the expenditures *at the end of November,* 1953, and that it was insufficient to make the payments provided in the stipulation involved in this case, as well as the payments required under

the Nowell agreement and the Rushlight note. The latter were no part of the settlement agreement involved in this case, and the only agreement before this court. (TR 58-59, 63; TR 245, par. 21.) It must be noted, however, that the affidavits of Cash Cole and Tom Cole make no reference to the income of the property at the time that the settlement agreement was made on October 9, 1953, and prior thereto, before they had driven off tenants to create the large number of vacancies heretofore noted in par. 6 *supra.* The appellees point out that the settlement agreement contains no provision that the payments due from Fairview Development, Inc. were to be derived solely from its income, but said settlement agreement specifically provided that Cash Cole, Nowell and Bayview Realty, Inc. would secure performance of said undertaking by pledge of all of the stock of Fairview Development, Inc. (TR 38, par. 2, 9; TR 78, par. 14; TR 87, par. 2; TR 181, par. 10.)

16. Cash Cole—Nowell agreement.

Apparently during the negotiations involving the settlement in this case, other negotiations were carried on between Nowell and Cash Cole to sell the interests and claims of Nowell in Fairview Development, Inc. to Cole. Separate contracts and releases apparently were likewise drafted and executed by these parties, but were no part of the settlement agreement involved in this case or in issue. (TR 99, 167-170, 148, 58, 62-63; TR 83, par. 19; TR 245, par. 21.) Apparently Cole questioned the legality of

the settlement agreement with Nowell, but such dispute had no place in this proceeding.

17. Cash Cole—Rushlight note.

It seems that also as a result of the consummation of the settlement in this case, and the separate settlement between Nowell and Cole, it was necessary to guarantee certain payments to Nowell by Cole in the sum of $20,000.00 and to pay $5,000.00 to John Hedrick, attorney acting for both Cash Cole and Nowell. Rushlight and Cash Cole apparently agreed orally that Rushlight would cause to be paid all sums of money necessary to effect the transfer of stock from Nowell to Cole and to guarantee payment of said sum of $20,000.00. For this Rushlight received a note from Cash Cole in the sum of $25,000.00 and an assignment of the interest in the appellee corporation assigned by Nowell as security for the payment of said note. This agreement and note between Rushlight and Cash Cole were not involved in these proceedings nor under the settlement agreement and stipulation made herein. (TR 168-170; TR 84, par. 21; TR 148, 157; TR 84, par. 21; TR 245, par. 21.) It seems that Cash Cole also questioned the legality of his agreements and his note with Rushlight. (TR 57-58, 62.)

18. Purported contractors' shortages and errors.

Cash Cole by way of general conclusions without stating ultimate facts, reiterated claims upon which said suit No. 3532 was based (par. 10, *supra*), and which was dismissed with prejudice. (TR 399-400.)

Said suit sought damages for $699,912.27. (TR 386.) It was based on excessive and unreasonable claims involving purported defects in construction. The total amount actually in dispute did not exceed the maximum sum of $20,000.00 (TR 324, par. 10, 9(b); TR 177, par. 2, 3, 5 and 8; TR 332-333; TR 245, par. 22.) Cash Cole had doubled the amount of the same claims made in case No. 3532, incorporated them in a cross-complaint *lodged* in this case on February 23, 1954 (TR 132), which the *trial court denied leave to file* (TR 254, par. 2), and then contended that there were shortages under the construction contract performed by the Mortensen Company, in the sum of $1,356,-043.15 and $380,525.44. (TR 144, 148, 136; TR 245, par. 21.) The construction contract, however, only involved $3,080,000.00 all told. Errors in construction in the aggregate sum of $141,000.00 are claimed by him. (TR 145, 133.) All of these claims and counterclaims were the subject of the settlement involved in this case and were mutually released by the parties hereto. (TR 41, par. 7.) They were also all involved in said case No. 3532, and by stipulation said case was dismissed October 28, 1953, *with prejudice.* (TR 375-398, 399-400; TR 246, par. 22.)

Of course, the appellees deny misappropriation of any funds in construction of Fairview Manor, and show completion of such construction in accordance with the plans and specifications and unequivocally deny all the reckless charges and claims made by Cash Cole. Such construction was inspected and approved by FHA, including materials used and the work per-

formed, before it would insure the mortgage on the project. (TR 332-333, 177-178; TR 324, par. 10.) Cash Cole from time to time complained of construction deficiencies, but these, on analysis, were not inadequacies of construction, which passed FHA inspection and were approved and accepted by it, but rather involved inadequacies of plans and specifications furnished by Cash Cole and his architect. (TR 177, par. 2, 3, 5, 8.)

MISCELLANEOUS.

19. Ownership of stock.

At the time of the settlement and entry of final decree in this case, the appellees, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson owned collectively 450 shares of capital stock of the appellee corporation, representing 50% of the voting stock. (TR 67, par. 2.) Bayview Realty, Inc., was the owner of the other 50% of said capital stock, consisting of 450 shares, and representing 50% of the voting stock. Cole and Nowell controlled Bayview Realty, Inc. (TR 67, 175, 167.)

20. Improper acts of appellants in management.

The purpose of this suit filed by appellees was to resolve the deadlock in the conduct and affairs of appellee corporation, due to failure of the board of directors to proceed, to resolve the deadlock among stockholders and members of said board resulting in paralysis of corporate functions, to end dissension and discord in said board, to eliminate mismanagement and improper disposition of funds and

dissipation and misappropriation of assets and impairment of corporate property by the principal appellants. (TR 66, par. 1; TR 96; TR 93, par. 2; TR 3-15; TR 247, par. 23.) The proceedings at the trial and the deposition taken theretofore of Cash Cole, and the affidavits filed showed many improper acts in management by Cash Cole and members of his family and Nowell: (a) Purchase of auto parts out of funds of appellee corporation for Tom Cole (Nowell, TR 173, 149, 479-481, 490-491, 550, 556); (b) improper payment of monthly salary of $1,000.00 to Nowell while he was employed full time by the Alaska Freight Lines in Juneau (TR 150-151, 336, 445, 495, 502, 512-514); (c) sending the daughter-in-law of Cash Cole on an extensive trip to the United States and for her personal benefit at the expense of appellee corporation (TR 173, 551); (d) expenditure of corporate funds for excessive long distance phone calls (TR 173-174, 337, 552-553); (e) payment out of corporation funds for vacation of Cole and members of his family (TR 174, 338, 528-532); (f) furnishing of a free apartment and bar for Nowell, which he only occasionally used, but was always available (TR 149, 502-504, 553-554); (g) apartments made available to members of Cole's family free of rent (TR 88, par. 4 c; TR 505-506, 149-150, 137); (h) exorbitant and unauthorized salaries paid to Cole and Nowell (TR 88, par. 4 b; TR 137, 149-150, 336); (i) inefficient management generally and numerous family members of Cash Cole on the payroll (TR 170, 173-175, 315-316, 470-478, 482-485); (j) unauthorized

control, failure to account, lack of stockholders' annual meetings and meetings of board of directors, and usurpation of the operation and management of Fairview Manor by the appellants, and dissipation of the assets and funds of the appellee corporation (TR 87, par. 4; TR 190-194); and (k) purchase of gifts at expense of appellee corporation from Cash Cole to Rushlight. (TR 552, 565.)

21. Amount of investment by Cole and Nowell.

The sole investment of Nowell and Cole in the Fairview Manor project for which they received 50% of the stock issued in the name of Bayview Realty, Inc., was securing a lease for 75 years on the land from the City of Fairbanks and a temporary commitment apparently for an FHA mortgage. (TR 160.) The Mortensens and Henderson undertook to secure a financial institution in Seattle to accept a mortgage, to construct the buildings as provided in the plans and specifications and in conformance with the requirements of FHA and mortgage limitations, and to guarantee performance under the construction contract. (TR 305, par. 1.)

B. CONTROVERSIES EXISTING AT TIME OF FILING SUIT, TRIAL AND SETTLEMENT.

A statement of the controversies existing between the stockholders involved in this case, and the corporate directors and officers existing at the time of filing this suit, the trial and settlement, as well as other

circumstances has been prepared and is contained in the Appendix to this brief, without, however, waiving the position of the appellees that such controversies and circumstances have no bearing on the issue now before this Court.

It has been pointed out already in this statement following Section 14 thereof, that the purpose of touching on these matters is to contradict appellants' apparent effort to picture Cash Cole as a "good citizen," "deprived of his livelihood," deprived of his property, "brow-beaten," and otherwise subjected to a purported "scheme" to defraud him by his numerous attorneys and his associates in business, Messrs. Nowell and Rushlight, and to show the utter lack in fact or evidence of any foundation for such representations and contentions, and to reveal the true nature and conduct of Cash Cole in usurping control of the assets and income of the appellee corporation and the conduct of the affairs thereof "to suit himself," to control all of its funds, and to "pay himself an exorbitant salary and expenses" to the detriment and loss of not only said appellee corporation but the stockholders as well. (TR 315.)

Appellants in their brief devote a substantial portion thereof to these controversies and conflicting claims, which were settled by the compromise agreement and the stipulation filed in this cause (TR 38-43) and the final decree entered thereon (TR 45-46). These controversies and the purported claims of appellants concerning defects in construction at Fairview Manor are not at issue in this appeal, but ap-

pellants have attempted to bring them to the attention of this court in their brief and by references to their cross-complaint, which they asked leave of the trial court to file, after a trial in this suit had commenced and a final decree had been entered, and after the matters contained in said cross-complaint were re adjudicata, as more fully shown in Section II of the "ARGUMENT", *infra.* Such cross-complaint was only lodged (TR 132) and is not properly a part of the court record and proceeding, since the trial court denied leave to file said cross-complaint (TR 254, par. 2).

Numerous references to "documentation" of the appellants are contained in their brief. Their counsel apparently erroneously assume that citation to said cross-complaint and to other pleadings of the appellants constitutes such documentation. Great reliance is placed upon this purported "documentation" on said cross-complaint.

QUESTION INVOLVED.

Did the appellants establish any ground under *Rule 60 (b) of the Federal Rules of Civil Procedure,* by clear, unambiguous and convincing proof, so as to sustain their motion to rescind the compromise agreement and stipulation embodying the latter and to vacate the final decree based thereon?

SUMMARY OF ARGUMENT.

Introduction.

I. Appellants have not established any grounds to set aside their stipulation and settlement agreement and to vacate the final decree based thereon.

1. Grounds alleged by appellants.
2. Court can refuse to vacate decree.
3. Burden of proof is on appellants.
4. Appellants' affidavits are insufficient.
   (a) Argumentative.
   (b) Conclusions of fact, not ultimate facts.
   (c) Conflicting.
   (d) "Double talk".
   (e) Assumptions without factual basis, or legal conclusions.
   (f) Immaterial matters.
   (g) Misleading statements.
   (h) Primary effort of appellants' affidavits.
5. There is no clear, unambiguous and convincing proof of fraud, conspiracy, or any of the other acts charged in the motion to vacate the decree.
6. There is no clear, cogent and convincing proof that at the time of the execution of the stipulation and settlement sought to be rescinded Cash Cole was mentally incompetent.

(a) Test of mental competency.
(b) Presumptions.
(c) Witnesses.

7. Cash Cole cannot secure rescission of the settlement agreement and the final decree, without restoring appellees to status quo.

8. Appellants affirmed or ratified the settlement agreement by failing to disaffirm it without delay and by accepting benefits thereunder.

II. The various matters which appellants attempt to raise in the cross-complaint lodged in trial court were res adjudicata and not in issue on the motion to vacate.

III. The propriety of the trial court's appointment of a receiver on May 7, 1954 to preserve the assets of appellee corporation, and prevent further injury to stockholders' interests is not an issue on this appeal.

1. Alaska statutory provision.

2. The court has inherent power to appoint a receiver at the instance of a stockholder for a going, solvent corporation on grounds of fraud, mismanagement, or dissensions.

3. Other circumstances justifying appointment of receiver.

4. Authorities cited by appellants are not in point.

IV. Questions pertaining to enforcement of trial court's final decree of October 10, 1953 and order entered May 7, 1954, all pertaining to matters adjudicated by said final decree, or said order, having no bearing on the grounds for the motion to vacate, are not in issue on this appeal.

ARGUMENT.

The only issue before this court is raised by the motion of the principal appellant, Cash Cole, and his captive corporation, Bayview Realty, Inc., to set aside the stipulation containing the settlement agreement filed October 9, 1953 (TR 38-44), and to vacate the final decree entered thereon, pursuant to Rule 60(b) of the *Federal Rules of Civil Procedure.* The appointment of receiver sought by appellees following the filing of said motion (TR 101-103, 183-187) was ancillary relief required by reason of appellees' defaults under said compromise agreement and to enforce the final decree (TR 45-46) and the order denying the motion to vacate entered May 7, 1954 (TR 252-258), and prevent any further injuries in the future. The appointment of the receiver under said order entered May 7, 1954 (TR 255, par. 5) has consequently no bearing on the issue now before this court, and is not an issue on this appeal. Similarly any other provisions of said order directing enforcement of the court's decision (TR 254, par. 2, 3, 4, 6-8) are not in issue before this court.

The appellants improperly attempt in their notice of appeal filed May 10, 1954 (TR 264) to appeal from the final decree entered October 10, 1953, since the time in which to appeal from said judgment had long expired. (Rule 73 (a), *Federal Rules of Civil Procedure.*) Their appeal can only be from the order entered May 7, 1954 (TR 254, par. 1) denying their motion to vacate said final decree. This is clearly pointed out in *Washington v. Sterling* (1952, Munic. Ct. App., D.C.) 90 A. (2d) 836, cited in appellants' brief at page 80 on a general legal proposition. The court in said case held that an appeal from an order denying a motion based on rule 60 (b), being substantially the same as Rule 60 (b) of the *Federal Rules of Civil Procedure,* did not bring up for review the judgment sought to be vacated, but it brought up only the question of whether the trial court erred in denying the motion to vacate.

It is also necessary to emphasize at the beginning of this argument that references by appellants to events transpiring on and after May 7, 1954 following the appointment of the receiver and to which they make reference in their brief, have no bearing on the question before this court on appeal. On October 10, 1953, when the trial court approved the compromise agreement entered into between the principal parties to this cause, the appellants were in possession of all of the assets of the appellee corporation and in control thereof and its income, and had been in possession of such assets and control of such income from the time that the apartment project had

been completed. All the appellees had at that time was the promise of the appellants contained in the compromise agreement to purchase their interest in the corporation, to direct certain payments promised by said corporation, to deposit all of the shares of stock of said corporation acquired by them or owned by them as security for their promises, etc. Appellees relied upon said promises in good faith and carried out their obligations under said agreement. Appellants immediately defaulted under some of the obligations undertaken by them under said compromise, and eventually all of such obligations. They continued, however, in possession of the assets of the appellee corporation and in control of the corporate income and its disbursement. They continued to enjoy all this time (since 1951) salaries and other benefits derived from the corporation, the amount of which were determined at their sole discretion. Such was the situation on December 17, 1953 when the firm of Cake, Jaureguy & Hardy filed notice of their withdrawal as attorneys for Cole, Nowell and Bayview Realty, Inc. (TR 371.) This same situation continued on January 8, 1954 when the present counsel for appellants filed their motion to set aside and vacate the stipulation and judgment based thereon. (TR 52-56.) It continued at the time that appellees served their notice of default and demand dated February 9, 1954 and filed February 13, 1954 with the trial court. (TR 371-373.) This situation continued while appellants were granted opportunity by the court to file affidavits in support of their motion to vacate the final

decree, and an opportunity for their counsel and opposing counsel to present oral arguments based on such affidavits and counter-affidavits.

It was not until May 7, 1954 when the order was entered denying appellants' motion to vacate the final judgment (TR 252-258), that the situation changed. Under said order the court further made provision to enforce its final decree of October 10, 1953 and granted, among other things, the motions of the appellees for appointment of a receiver, for the corporate assets and income, and directed that the certificates of stock pledged by the appellants as security for performance of their obligations under the compromise agreement be delivered to the appellees as their property in accordance with the terms and provisions of said compromise agreement. Said order of May 7, 1954 was entered after due hearing predicated on the motions of the respective parties then pending before the trial court and on the affidavits and counter-affidavits filed in support or in opposition to such motions.

Thus the situation existing since May 7, 1954 arises through no fault of the appellees, but is due to the defaults of the appellants under their compromise agreement and failure to abide by the terms and provisions thereof.

I. APPELLANTS HAVE NOT ESTABLISHED ANY GROUNDS TO SET ASIDE THEIR STIPULATION AND SETTLEMENT AGREEMENT AND TO VACATE THE FINAL DECREE BASED THEREON.

The final decree entered October 10, 1953 disposed of all the claims of the parties to this cause by approving and embodying their settlement agreement. (TR 45-46.) It cannot be vacated except on the grounds set forth in rule 60 (b) of *Federal Rules of Civil Procedure:*

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *"

1. GROUNDS ALLEGED BY APPELLANTS.

The motion of appellants in a "shotgun" fashion, sets up the following grounds: (a) fraud; (b) mental incapacity of Cash Cole as a result of a heart attack (but this is not clearly alleged); (c) mistake, inadvertence, surprise, inexcusable neglect; (d) conspir-

acy to defraud by the Mortensens, Henderson, Nowell, and W. A. Rushlight; (e) stipulation and decree is unconscionable, impossible of performance, and confiscatory; (f) no authority by stockholders to execute stipulation; (g) separate agreements made with Nowell and Rushlight were without consideration; and (h) no ratificaton of stipulation by Cash Cole. Their affidavits only attempt to support grounds (3) and (6) under above rule.

2. COURT CAN REFUSE TO VACATE DECREE.

The refusal of the court to vacate a decree under this rule is within its discretion, and the exercise of such discretion can only be reviewed for abuse thereof. (*Greenspahn v. Joseph E. Seagram & Sons, Inc.*, (CCA 2) 186 F.(2d) 616); *Johnson v. Masonic Bldg. Co.*, (CCA 5) 138 F.(2d) 817, aff'g 51 F.Supp. 527.)

The authorities cited by the appellants in their brief (pages 17, 21 and 29) are not in point in this appeal since such authorities pertained to situations involving motions to vacate default judgments or consent judgments providing for assessment of damages or imposition of other demands upon the defendant or defendants involved in the particular case cited. It might be pointed out that quotations from such authorities by the appellants largely represent headnotes to the court decisions, and no effort is made to show the facts involved in said cases. In this cause there has been no default judgment or consent decree providing for assessment of damages or imposition of any demands only against the appellants. In this

cause there was a compromise agreement, which was merely approved by the final decree entered in this cause, and which decree in fact vacated an order appointing a receiver, which appellants desired.

Thus in *Assman v. Fleming,* 159 F.(2d) 332, 336, cited by appellants at pages 17, 29 and 80 of their brief, there was involved a consent judgment. This case is more fully noted in the next subsection.

1 *Freeman on Judgments,* 580 (5th Ed.), sec. 292, cited by appellants in their brief at pages 21 and 29, actually refers to default judgments or judgments by confession. The one sentence quoted from this text by the appellants at page 21 of their brief is lifted from the section dealing with various principles governing exercise of the court's discretion. Appellants have ignored the following from said text at the same page:

> "It has been said that the discretionary power to vacate judgments, given by the statute should be exercised sparingly and only for the purposes furthering the ends of justice and not to relieve against slovenly preparation or careless trial of causes. While statutory provisions authorizing the vacation of judgments are remedial in character and intended to afford a speedy and efficient means of relief, yet they are not to be invoked so as to impair the attribute of certainty and finality which should attend all judgments, *and a judgment should never be annulled except upon due consideration based upon a clear showing.* On the other hand, it is generally recognized that the discretionary power of the court should be liberally exercised in furtherance of

justice, to the end that cases may be disposed of upon their merits rather than upon technicalities or fortuitous circumstances. It is the policy of the law and the purpose of the statutes here under consideration to give every person an opportunity to present his cause of action or defense upon the merits, and where he has been deprived of this opportunity *without fault on his part* to afford him relief. * * *" (Emphasis added.)

The same writer in sec. 291 of said text, p. 578, further states:

"Only in extreme cases is the action of the trial court likely to be reversed. But in a plain case there is little or no room for discretion, and if the appellate court is satisfied beyond a reasonable doubt that the court below came to an erroneous conclusion, its action will be reversed, even where a judgment by default has been set aside. * * * *if the facts are disputed, the finding of the lower court will be treated as conclusive on appeal;* and even when the facts are not questioned, its action will not be reversed, except where it clearly appears that the court's discretion has been abused or that it has been exercised in an arbitrary manner." (Emphasis added.)

Jergins v. Schenk, 124 P. 426, 162 Cal. 747, cited by appellants at pages 21 and 29 of their brief, involved a motion by defendant to vacate under California statute a judgment by default, on the ground of excusable neglect supported by affidavits. There was no *contradictory evidence submitted by plaintiff.* The appellate court merely held that the neglect of

defendant's representative was not so obviously without excuse as to warrant the appellate court in reversing the trial court's order permitting an answer and a trial on the merits.

Humphreys v. Idaho Gold Mines Development Co., 120 P. 823, 21 Idaho 126, 40 LRA (NS) 817, cited by appellants at pages 21 and 29 of their brief, also involved a motion by defendant under state statute to vacate a judgment by default, supported by an affidavit. Apparently there was no contradictory evidence again. The trial court granted the motion, which order was sustained on appeal.

3. BURDEN OF PROOF IS ON APPELLANTS.

The burden of proving fraud, mental incapacity, or any of the other purported grounds set up in their motion is on them. Grounds so alleged cannot be presumed, but must be proved by clear and convincing evidence. (*Assman v. Fleming,* (CCA 8) 159 F.(2d), 332, cited by appellants in their brief at pages 17, 29 and 80 on a proposition not in point in this case; see also *infra,* par. I, 5, 6; see also TR 248, par. II.)

The above mentioned case and others further require that the application to vacate the judgment be accompanied by a showing that the defendant has a meritorious defense to the action. This again presupposes a default judgment or a consent judgment, which is not the situation in this case. The appellants already had an answer on file (TR 15-20), when the compromise settlement was made and the final decree was entered on October 10, 1953.

The case of *Assman v. Fleming,* above mentioned, and cited by appellants at pages 17, 29 and 80 of their brief, is actually in point and supports the contentions of the appellees. This case was an appeal from an order denying a motion to vacate a consent judgment entered against the appellant. Suit had been filed by Fleming against the defendant for treble damages for violation of the Emergency Price Control Act. With the complaint a stipulation was filed signed by defendant waiving service, answer and defenses and hearing, and consenting to entry of judgment for $5,061.01 and a permanent injunction. Judgment was entered on December 28, 1945, and the money part thereof was satisfied on the same day. On January 4, 1946, the defendant filed a motion to vacate said judgment and to enjoin payment on his check, alleging among other things that the plaintiff's agents had fraudulently represented that he had violated the Act, and had induced him to enter into the settlement agreement reducing treble damages from $10,122.03 to $5,061.01 on the representation that there would be no publicity, whereas the pleadings in the case had been published resulting in harmful publicity. Affidavits in support of said motion were filed, and the court permitted the defendant to tender an answer in which he generally denied plaintiff's complaint. The plaintiff filed a response to the motion putting in issue all allegations, and oral testimony was allowed by the court, arguments were heard and briefs were submitted. The trial court denied the motion to vacate and such de-

nial was upheld by the appellate court in the above mentioned case.

The court states at page 336, after considering Rule 60(b):

> "* * * Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case. The burden of proving such fraud and misrepresentation is, of course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence. * * *"

The court in the same case at page 337 held that the defendant failed to sustain his charges of fraud, deceit, misleading or over-reaching contained in his motion to vacate, and stated:

> "The findings of the court are presumptively correct and should not be reversed unless clearly erroneous. It was within the province of the trial court to pass upon the credibility of the witnesses and the weight to be given to their testimony. Jackson County v. Dufty, 8 Cir., 147 F.2d 227; Kincade v. Mikles, 8 Cir., 144 F.2d 784. The order of the trial court, being sustained by substantial evidence, could not be held to be an abuse of discretion. Conceding, as the trial court did, that defendant's proffered answer pleaded a meritorious defense, *defendant is without standing here because the court has found that his charges of fraud and misrepresentation were untrue,* and it is not the province of this court to weigh the evidence nor to attempt to pass

upon the credibility of witnesses." (Emphasis added.)

In this same case the appellate court pointed out at page 338 that the only matter before the trial court in considering the motion to vacate the judgment was whether the judgment should be vacated because of the existence of the fraud, misrepresentation, and other grounds alleged by the defendant, and whether such defendant had proffered a defense on the merits. The latter was assumed to have existed, since an answer was filed, but it was held that the grounds for the motion had not been sustained.

4. APPELLANTS' AFFIDAVITS ARE INSUFFICIENT.

The affidavits presented by appellants in support of their motion to vacate the final decree are legally insufficient to establish any grounds on which said motion can be based under Rule 60 (b) above mentioned. (See TR 248, par. II.) The following insufficiencies, among others, are called to the court's attention:

a) Argumentative.

Cash Cole and other persons subscribing affidavits submitted by him often argue matters of law and deduction of fact. Thus Tom Cole urges that stock which, under the stipulation, was to be placed in escrow as security, should have been delivered to Cash Cole. (TR 135.) For examples of arguments by Cash Cole with respect to purported defects in building construction, which purported claims were consid-

ered in reaching the settlement in this case, as to voting rights of stockholders, and other matters, see affidavits of Cash Cole. (TR 145, 148, 157, 195-214.)

(b) Conclusions of fact, not ultimate facts.

All of appellants' affidavits fail to state ultimate facts, but generally just state the factual conclusions of the affiant.

(c) Conflicting.

Appellants' affidavits contain many conflicting assertions. Tom Cole (TR 135) states that "for three or four days no one was admitted to see Cash Cole, except affiant, Mrs. Cole and Dr. Ribar, and at no time during this period was any business discussed, * * *". Ruth Cole, however, (TR 141) states that Rushlight was talking with Cash Cole "over a period of several days" during the settlement negotiations.

Tom Cole (TR 134) affirms that he advised Rushlight and Jaureguy that it was impossible to perform the terms of the purchase agreement contained in the settlement terms. Yet, in the same affidavit he states that he had no "appreciable knowledge of the contents" of said settlement agreement. (TR 137.)

Ruth Cole certifies (TR 141) that Cash Cole did not have knowledge "for several weeks" of the terms of the settlement agreement. Tom Cole, however, (TR 134) states that Cash Cole knew after "several days" of the terms of said agreement.

Tom Cole (TR 137) denies that any exorbitant salaries were paid at Fairview Manor. Cash Cole,

however, (TR 149-150) admits that an exorbitant salary was paid to Nowell.

(d) "Double talk."

There is considerable duplicity in these affidavits. Thus Cash Cole (TR 157) states that his attorney Jaureguy did not make the settlement, but that Cake made the settlement (TR 162-163). Yet, he admits that Cake, Jaureguy and Hardy were attorneys representing him and other defendants. (TR 143.)

(e) Assumptions without factual basis, or legal conclusions.

Various legal conclusions are stated as matters of fact, and assumptions are asserted without any factual basis on which they are predicated being set out. For example, Cash Cole (TR 148) states that Rushlight had him "sign away his rights to Fairview Development, Inc." An examination of the settlement agreement contained in the stipulation clearly discloses that he purchased the interests and claims of the Mortensens and Henderson for a stated consideration, and put up all of the stock of appellee corporation acquired by him as security for the agreement of said corporation to pay off the conflicting claims, for certain releases, and for payment of the purchase price. (TR 38-44.) It is likewise obviously clear from the affidavits presented in opposition to this motion, as well as by the admission of Mrs. Ruth Cole, that the individual appellees were willing to buy out Cash Cole's stock and claims upon the same terms and conditions, but that he refused to sell. (See "Statement of Case", *supra,* par. 2.)

(f) Immaterial matters.

The appellants' affidavits contained many statements concerning immaterial matters that were not pertinent to the issue raised by their motion to vacate the decree. These have heretofore been noted in the "Statement of Case" following sec. 14, and involve various transactions between Rushlight and Cash Cole, between Nowell and Cash Cole, and between Kadow, Nowell and Cash Cole. Such transactions were no part of the settlement involved in this cause, or the subject matter of this cause, or the final decree. (See TR 152-155; "Statement of Case", par. 16, 17.) Similarly, various matters are raised concerning purported claims as to construction, etc., which were the actual matters considered in reaching a settlement in this case and in case No. 3532 pending at the time of the trial herein. (See "Statement of Case", par. 18.)

(g) Misleading statements.

In addition to the duplicity above mentioned, appellants' affidavits contain misleading statements. For example, Cash Cole (TR 161) speaks of voting rights and confuses the voting rights of stockholders with the voting rights of directors. The defendant Nowell (TR 174-175) points out another example of such misleading statements with respect to delivery of stock.

(h) Primary effort of appellants' affidavits.

An analysis of these affidavits, and a cursory examination of the cross-complaint lodged by them,

merely discloses that the sole object of their strategy, their arguments, unwarranted assumptions, references to immaterial matters, etc., is to revive the conflicting claims existing between the Cole group and the Mortensen group at the time this case was filed and at the time that the trial was commenced herein. (See "Statement of Case", par. 18, and Appendix.) These were the basis and reason for reaching the settlement evidenced by the compromise agreement. The reason for this strategy was the fact that Cash Cole had defaulted under that agreement, and by the terms thereof had lost ownership of the shares of stock, which were pledged as security for the performance of the undertaking to pay a total of $90,000.00 to the Mortensen group, and there was no ground for an appeal from the final decree approving said settlement, and the time for an appeal had expired. It must be assumed that at the time this agreement was made on October 9, 1953, the Cole group contemplated making the payments.

The purpose of Cash Cole for entering into the settlement agreement was to secure: Complete control of appellee corporation; the discharge of the receiver then appointed by the trial court; payment of mechanic's liens then being foreclosed by A. G. Rushlight and Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton; settlement of claims of various parties to this cause and dismissal of litigation pending between them; and to avoid continuation of trial in this case. The situation, however, changed shortly after said settlement agreement was made by reason

of Cash Cole's conduct in the management of Fairview Manor and his antagonizing of tenants, whereby a large number of vacancies occurred ranging from 55 to 71. This alone represented a minimum loss of gross revenue to the appellee corporation of from $6,325.00 to $8,165.00 a month. (See "Statement of Case", par. 6.) These amounts would have been more than ample to meet the obligation undertaken in the compromise agreement.

The sole purpose then of the appellants' motion was to extricate themselves from defaults under the settlement agreement and the loss of the stock pledged by them as security for the performance of said agreement. They sought the assistance of the trial court in equity, and now of this court, to perpetrate their scheme of avoiding their own promises contained in the stipulation, retaining all benefits derived thereunder, avoiding the effect of their defaults, and continuing in the illegal possession and control of the assets and income of the appellee corporation, using such assets and income for their benefit to the detriment and loss of the appellees.

5. THERE IS NO CLEAR, UNAMBIGUOUS AND CONVINCING PROOF OF FRAUD, CONSPIRACY, OR ANY OF THE OTHER ACTS CHARGED IN THE MOTION TO VACATE THE DECREE.

Fraud will never be presumed but must be proved by clear, convincing and unambiguous evidence. (*Alaska Northern R. Co. v. Alaska Central Co.,* 5 Alaska 377; *American Finance & Commerce Co. v. Gorden,* 1 P.(2d) 886, 164 Wash. 45; *Cerkonek v Dib-*

ble, (Wash.) 256 P.(2d) 488, 491; *Gonzelman v. Northwest Poultry & Dairy Products Co.,* 225 P.(2d) 757, 765, 190 Ore. 332.) The presumption is actually against fraud and it approximates in strength that of innocence of crime. (*Tecklenburg v. Washington Gas & Electric Company,* (Wash. 1952), 241 P.(2d) 1172; *Travelers' Ins. Co. of Hartford, Conn. v. Byers,* (Calif.) 11 P.(2d) 444, 447.)

Both the *Tecklenburg v. Washington Gas & Electric Co.,* (Wash. 1952), 241 P.(2d) 1172, see par. 6(c) *infra,* and *Handley v. Handley,* 243 P.(2d) 204, 172 Kan. 659, see par. 7 *infra,* are directly in point.

6. THERE IS NO CLEAR, COGENT AND CONVINCING PROOF THAT AT THE TIME OF THE EXECUTION OF THE STIPULATION AND SETTLEMENT SOUGHT TO BE RESCINDED CASH COLE WAS MENTALLY INCOMPETENT.

The proof clearly established that Cash Cole knew the nature, character and effect of his execution of the stipulation and understood the subject matter thereof and the transactions covered by said stipulation. ("Statement of Case", par. 3, 4, *supra.*)

It has already been pointed out in "Statement of Case", par. 3, that appellants' motion to set aside the compromise agreement and vacate the final decree (TR 52-56), and the various affidavits filed in support thereof do not contain a categorical statement or clear, cogent and unambiguous proof that Cash Cole was mentally incompetent to conduct the compromise negotiations, or to execute the compromise agreement contained in the stipulation. The strongest representation made is to the effect that he was unable to read

and was ill. Cash Cole admits that he "relied upon the statements" of Rushlight as to the contents of the compromise agreement, and does not state that he did not comprehend such contents, or that he was mentally incompetent, but rather represents that Rushlight made false and fraudulent representations as to said contents. (TR 57.) His subsequent statements do not contradict this fact. (TR 143, 156.) Any alleged action on the part of Rushlight which might have been fraudulent is not binding on the appellees, since they were not a party to it and there was no community of interest, nor was Rushlight an agent of the appellees, but rather the proof indicates was acting for Cash Cole with his consent and knowledge. Cash Cole has a remedy in court if he has suffered any damages as the result of any of Rushlight's acts.

There is likewise nothing contained in any of the affidavits signed by Cash Cole (TR 56, 143, 156) indicating that he did not discuss the terms and provisions of the settlement agreement before it was signed by him and by his attorney, Jaureguy. Obviously Cash Cole and Jaureguy would be the only persons who would have full knowledge on this matter. There seems to be some insinuation that Jaureguy and various other attorneys representing the appellants may be guilty of fraud or false representations to Cash Cole regarding the compromise agreement. Overlooking the fact that such insinuation is not clear, cogent and unambiguous proof, it must be again pointed out that Jaureguy did conduct the negotiations for Cash Cole, and was his attorney and

agent, and any misconduct on his part or the part of any other attorneys or agents representing the appellants and said Cash Cole specifically would not be binding upon the appellees, but would be binding upon the appellants, and for which they have an adequate remedy at law in a suit for damages. It might be observed, however, that Cash Cole recklessly charges all of his former associates, and apparently his attorneys, with misconduct, as well as the appellees. He fails, however, to support such charges with tangible proof, other than his own assertions and those of his son and wife.

The appellees were justified in relying on agreements reached with Jaureguy as attorney for Cash Cole and Bayview Realty, Inc., since he was acting for Cash Cole both at the trial and in the conduct of said compromise negotiations with the consent and approval of Cash Cole. It is noteworthy that Jaureguy refused to execute the stipulation and the compromise agreement contained therein until he had submitted it to Cash Cole for his personal consideration and secured his signature thereto. (TR 74.) It was not until December 16 or 17, 1953 that appellees received notice of the withdrawal of Jaureguy and his firm as attorneys for Cole, Nowell and Bayview Realty, Inc. This was more than two months following the execution of the settlement agreement. (TR 371.)

(a) Test of mental competency.

Old age, weakening of the memory and understanding and occasional strange and eccentric acts

are not themselves sufficient evidence of "mental incapacity", but the test is the ability to know the nature, character, and effect of one's acts and to understand the subject matter of business transactions in which one is engaged. (*Tecklenburg v. Washington Gas & Electric Co.,* (Wash. 1952) 241 P.(2d) 1172; *Beckley Nat. Bank v. Boone,* (CCA 4, 1940) 115 F.(2d) 513, rev. 32 F.Supp. 896, cert. denied 313 U.S. 558, 61 S.Ct. 835, 85 L.Ed. 1519.) A person, however old, or in failing health, so long as he retains appreciation of his possessions and relations to others may dispose of his property in any lawful way he sees fit and regardless of whether anyone may be pleased therewith. (*Tecklenburg v. Washington Gas & Electric Co.,* (Wash. 1952) 241 P.(2d) 1172; *Boardman v. Lorentzen,* 145 N.W. 750, 155 Wis. 566, 52 L.R.A. (NS) 476; *Sneathen v. Sneathen,* 16 S.W. 497, 104 Mo. 201; *Hughes v. Bullen,* 95 So. 379, 209 Ala. 134.) Mere weakness of mind or age, physical disability or abnormality do not constitute insanity under which contracts and conveyances of an insane person are rendered voidable. The line is drawn at actual insanity, as distinguished from weakness of mind unaccompanied by infirmity overthrowing reason. (28 *Am.Jur.* 701, sec. 66, 67; 1 L.R.A. 611; 35 L.R.A. (NS) 1092; *Pass v. Stephens,* 198 P. 712, 22 Ariz. 461; *Ralston v. Turpin,* 129 U.S. 663, 32 L.Ed. 747, 9 S.Ct. 420; *Argo v. Coffin,* 32 N.E. 679, 142 Ill. 368; *Stockmeyer v. Tobin,* 139 U.S. 176, 35 L.Ed. 123, 11 S.Ct. 504.)

(b) Presumptions.

The law will presume competency rather than incompetency, and every man is fully competent until satisfactory proof to the contrary is presented. (28 *Am. Jur.* 751, sec. 121; *Assman v. Fleming,* 159 F.(2d) 332.) Every man is presumed capable of managing his own affairs and is responsible for his own accounts. (*Isle v. Cranby,* 64 N.E. 1065, 1068, 199 Ill. 39, 64 L.R.A. 513.) It is presumed that every man is capable of understanding the nature and effect of his contracts. (*Spurlock v. Noe,* 43 S.W. 231, 19 Ky.L.Rep. 1321, 39 L.R.A. 775; Ann. 36 L.R.A. 723.)

(c) Witnesses.

The number, character and intelligence of witnesses and their opportunities for observation should be considered upon the question of insanity. (*Assman v. Fleming,* 159 F.(2d) 332; *Roxana Petroleum Corp. v. Colquitt,* 34 F.(2d) 470, aff. 49 F.(2d) 1025, cert. denied 284 U.S. 669, 52 S.Ct. 43, 76 L.Ed. 566; 28 *Am. Jur.* 763, sec. 135.)

The case of *Assman v. Fleming,* 159 F.(2d) 332 is in point, and has been heretofore noted in sec. I, 3. The case of *Tecklenburg v. Washington Gas & Electric Co.,* (Wash. 1952), 241 P.(2d) 1172 is also directly in point. The lessor in that case was 81 years old. She went to a mental sanitarium five months after the renewal of a lease, which was sought to be rescinded in said case. Under the lease renewal she had reduced the rent approximately in half. There was testimony concerning her mental condition by her attorney, a probate judge who knew her at the time that

she administered her husband's estate, two friends and neighbors, the manager of a department at her bank and a doctor, as to her apparent lack of mental capacity at the time of the execution of the lease. The court held that mental competency is presumed and evidence to establish incompetency must be clear, cogent and convincing. The best evidence in that situation would be that of a physician versed in mental diseases, but the court further held that he was mistaken as to her mental incapacity, since it appeared from the evidence that she possessed sufficient mind and reason to enable her to comprehend the nature, terms and effect of the lease transaction at the time of the execution thereof, and there was no overreaching.

In *Argo v. Coffin,* 32 N.E. 679, 142 Ill. 368, the court noted that as to mental capacity there was a great conflict in opinions of numerous witnesses, and impossible to tell on which side the preponderance was. Consequently, the presumption of competency was controlling, and the trial court was reversed.

Dr. Ribar in his affidavit (TR 65, 94) clearly stated that he did not examine the patient as to mental competency, but only as to his physical disability, and that he was not physically disabled from doing business after the expiration of 72 hours following his heart attack. Appellants in their brief, page 26, point out that the appellees procured and filed the doctor's last affidavit, but then contradict themselves at page 27 by saying that appellees presented no testimony of any physician. Obviously the first affidavit of the

doctor was procured by appellants. Rushlight in his affidavit (TR 170) states that Cash Cole fully understood the stipulation and the transactions involved and that Jaureguy, his attorney, explained the entire matter to him. Members of Cole's family admitted that the compromise was discussed with Cash Cole. ("Statement of Case", par. 3, 4, *supra.*)

7. CASH COLE CANNOT SECURE RESCISSION OF THE SETTLEMENT AGREEMENT AND THE FINAL DECREE, WITHOUT RESTORING APPELLEES TO STATUS QUO.

Appellees have completed performance under said agreement and the final decree entered thereon, but Cash Cole has not. ("Statement of Case", par. 12, 13, 14, *supra.*)

An incompetent person is in no event entitled, in equity, to a rescission or cancellation, on account of mental infirmity, as a matter of right, and if it appears inequitable in a particular case to set aside a conveyance or a contract on such grounds, there is no inexorable rule that it must be done. The circumstances of each case will govern the action of equity. (28 *Am. Jur.* 720, sec. 87; *Sprinkle v. Wellborn,* 52 S.E. 666, 140 N.C. 163, 3 L.R.A. (NS) 174, 179; *Coburn v. Raymond,* 57 A. 116, 76 Conn. 484.)

Under general principles of equity, it is generally held that before an equitable action to obtain rescission of a contract or deed tainted by fraud can be successfully prosecuted to completion and obtaining of relief, any money, property, or rights of action received thereunder should be restored, and in some jurisdictions, before even bringing the action, should

be tendered or offered in restoration of the status quo, since the fundamental object of equitable rescission is restitution and restoration of the parties to the position which they occupied before the transaction infected with fraud was negotiated and partially or completely performed. The well known equitable maxim that "he who seeks equity must do equity" has been stated in many cases to be the basis of the principle. (24 *Am.Jur.* 16, sec. 196.)

Restoration of status quo, or benefits is a prerequisite. A party seking rescission of a contract or deed, in equity, must be willing to restore benefits which he has received thereunder before he can expect equitable relief. (24 *Am.Jur.* 81, sec. 250.) This equitable rule is supported by the great weight of authority. (5 *Williston on Contracts,* rev. ed., Williston and Thompson, 4288, sec. 1529; 28 *Am.Jur.* 716, sec. 84; Ann., 46 A.L.R. 419, 95 A.L.R. 1443.)

The case of *Handley v. Handley,* 243 P.(2d) 204, 172 Kan. 659, is nearly in point in this situation. In that case the plaintiff and defendant were twin brothers. The plaintiff about six months before he was committed to a state hospital for the insane for about three months upon the petition of the defendant, conveyed his farm to the defendant without consideration and under an oral agreement that his brother would look after the land and protect the plaintiff's interest therein, and reconvey it to the plaintiff when he had repaid his brother the money that he would advance on account of the realty. The defendant paid substantial sums for taxes and on account of the

mortgage, and also made permanent improvements. The plaintiff did not repay his brother for these advances and improvements, or even offer to pay. There was testimony of the doctor that at or about the time of the conveyance the plaintiff had suicidal and homicidal tendencies and it was his opinion that he was incompetent to transact business. There was also testimony of four other witnesses as to his incompetency at the time of the execution of the deed. This was contradicted by evidence that the plaintiff did comprehend the nature of the transaction concerned. The court refused to set aside the deed in view of plaintiff's failure to restore the benefits he had received, including moneys advanced by the defendant and payment for improvements made by him.

8. APPELLANTS AFFIRMED OR RATIFIED THE SETTLEMENT AGREEMENT BY FAILING TO DISAFFIRM IT WITHOUT DELAY AND BY ACCEPTING BENEFITS THEREUNDER.

There was no written repudiation of the settlement agreement served on appellees following execution of said stipulation on October 9, 1953 until January 8, 1954, when a motion was filed in this case to set aside the stipulation and vacate the decree, three months after the execution of said agreement and entry of said decree. During that period appellants permitted performance under said agreement and decree by appellees and accepted the benefits of such performance. ("Statement of Case", par. 8, 12, 13, 14, *supra.*)

Repudiation is essential. Disaffirmance of the settlement agreement, as well as an offer to return the benefits received by the purported incompetent, are

conditions precedent to a right to rescind such contract on the ground of incompetency or fraud. (28 *Am.Jur.* 709-710, sec. 77, sec. 56.) One who wishes to rescind must manifest his election to do so without undue delay, or the right will be lost, especially where there is further performance due under the contract from the other party, which in the absence of notice he might suppose would be accepted in spite of his prior breach or wrong-doing. (5 *Williston On Contracts, rev. ed.,* Williston and Thompson, 4110, sec. 1469; *E. J. Albrecht Co. v. New Amsterdam Cas. Co.,* 163 F.(2d) 16.)

II. THE VARIOUS MATTERS WHICH APPELLANTS ATTEMPT TO RAISE IN THE CROSS-COMPLAINT LODGED IN TRIAL COURT WERE RES ADJUDICATA AND NOT IN ISSUE ON THE MOTION TO VACATE.

Cash Cole and Bayview Realty, Inc. lodged a cross-complaint and asked leave of court to file the same. (TR 103, 55.) Said cross-complaint purportedly includes Fairview Development, Inc. as claimant, and covers various purported defects in construction, which were the subject matter of case No. 3532 filed by Fairview Development, Inc. versus the individual appellees in the District Court of the United States for the Western District of Washington, Northern Division. ("Statement of Case", par. 10, 18, *supra.*)

In said case No. 3532 a stipulation was executed by the plaintiff and the defendants therein providing that said case "has been fully settled and compromised and that the same should be dismissed with

prejudice and without costs''. An order was entered on October 28, 1953, whereby said case was ''dismissed with prejudice and without costs''. (TR 399-400; TR 246, par. 22.) Such dismissal with prejudice constitutes res adjudicata of the subject matter contained in the cross-complaint which appellants sought to file after trial had commenced and a final decree was entered. (30 *Am.Jur.*, sec. 161.)

It has already been pointed out and it is submitted that the subject matter of said cross-complaint was not in issue under the motion filed by appellants to vacate the final decree, and is not a proper matter for consideration on this appeal under the question involved therein. That question concerns only the sufficiency of the grounds for said motion, that is, whether fraud, mental incompetency, or any of the other reasons alleged by appellants had been established, by proper proof, so that the denial of their motion by the trial court was an error. The matters contained in said cross-complaint, which was only lodged in the trial court and not admitted therein, have no bearing on said grounds.

III. THE PROPRIETY OF THE TRIAL COURT'S APPOINTMENT OF A RECEIVER ON MAY 7, 1954 TO PRESERVE THE ASSETS OF APPELLATE CORPORATION, AND PREVENT FURTHER INJURY TO STOCKHOLDERS' INTERESTS IS NOT AN ISSUE ON THIS APPEAL.

The appellants devote considerable space in their brief, pages 62-74, to contending that the trial court erred in appointing a receiver for Fairview Manor

under the order entered on May 7, 1954, and cite most of their authorities under this point. This appointment has no bearing on the question before this court as to the sufficiency of the grounds necessary to sustain the motion of appellants to vacate the final decree of October 10, 1953, and the appointment of such receiver by the trial court to enforce its final decree and order of May 7, 1954 is not a proper matter for review on this appeal.

Regardless of this point, the following justification of the action of the trial court is noted:

1. ALASKA STATUTORY PROVISION.

The *Alaska Compiled Laws Annotated, 1949,* 55-6-91 provide:

> "A receiver may be appointed in any civil action or proceeding, other than an action for the recovery of specific personal property—
>
> "First. Provisionally, before judgment, on the application of either party, when his right to the property, which is the subject of the action or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired * * *."
>
> "Second. After judgment, to carry the same into effect;"

It is obvious from the "Statement of Case" *supra,* that the rights and privileges of appellees as stockholders, which are the subject of this action, are the property rights involved in this cause, and were seriously affected by the conduct and actions of the ap-

pellants. In addition, those property rights as well as the appellees' right to profits earned by their investment in the appellee corporation had not only been impaired since the beginning of the business operations of said corporation, but were in danger of being lost or materially injured in the future.

2. THE COURT HAS INHERENT POWER TO APPOINT A RECEIVER AT THE INSTANCE OF A STOCKHOLDER FOR A GOING, SOLVENT CORPORATION ON GROUNDS OF FRAUD, MISMANAGEMENT, OR DISSENSIONS.

This rule is now well settled, although occasionally there have been some judicial expressions of opinion to the contrary. A court of equity has inherent jurisdiction at the instance of stockholders regardless of their number, in a proper case, to appoint a receiver for a solvent corporation, on the grounds of fraud, mismanagement, or dissensions among the stockholders, directors, or officers, if there is no other adequate remedy. (43 ALR, 246 and cases cited; 61 ALR, 1214, and cases cited; 91 ALR, 665-666 and cases cited; 19 CJS 1173.)

3. OTHER CIRCUMSTANCES JUSTIFYING APPOINTMENT OF RECEIVER.

On May 7, 1954, when the trial court denied appellants' motion to vacate the final decree, the appellees were entitled to take over the administration of the assets and income of the appellee corporation as its stockholders, to elect a board of directors, and to administer the assets of said corporation as they saw fit. The appellants, however, were in possession and wrongfully withholding such control and enjoyment

from the appellees and threatening further injury to their rights. All of the following circumstances were present and justified the appointment of a receiver:

(a) Large expenditures and extravagance.

In *Ashton v. Penfield,* 135 S.W. 938, 233 Mo. 391 (1910), it was held that the appointment of a temporary receiver and other relief falling short of dissolution of the corporation were proper, where the complainant owned 49 out of 100 shares of stock, but was denied access to the books of the company, which was being fraudulently managed by the husband of one of the other two stockholders who were defendants, under a conspiracy to secure the profits for themselves. The sole asset of the corporation was a business building, which the court said apparently rented readily, but had passed from a dividend-paying basis to a nondividend-paying basis, with no proper excuse. The court stressed the fact that the defendants were silent when fraud, extravagance, mismanagement, and oppression were laid at their door and were proved to exist; and stressed that the evils present were *not the mere product of ignorant inefficiency or mere differences of opinion in the administration of complicated and delicate affairs, but were the product apparently of design and a disposition and power to wrong.* See also *Ames v. Goldfield Merger Mines Co.,* 227 F. 292 (1915, DC). In the latter, it appeared that there were only four meetings of the board of directors in approximately four years, officers made no report to stockholders, no meeting of stockholders had been called for three

years, and $250,000.00 was expended constituting practically all available corporate funds; so continuance of a temporary receiver held proper.

(b) Usurpation of corporate powers.

In *Brock v. Automobile Livery & Sales Co.,* 58 So. 21, 130 La. 404 (1912), it was held that a proper case for appointment of a receiver and the issuance of an injunction was shown where two brothers, owning one-half of the capital stock of a corporation,—the one holding the office of vice president and the other that of secretary and treasurer,—combined in antagonism to the third member of the corporation, who held the office of president and owned the other half of the stock, and, disregarding the charter and action of the board of directors, of which they were members, usurped all the power of the corporation and excluded their associate from the exercise of his rights as a stockholder, director, and president. The allegations that the affairs of the corporation were being mismanaged and that the interests of such associate were being jeopardized were held fully justified under these conditions.

(c) Personal gain and unnecessary salaries.

Where it is shown that the officers and directors of a corporation are mismanaging its affairs for their own personal advantage and gain, that the profits of the corporation are being absorbed by such mismanagement in paying the salaries of favored employees, whose services are unnecessary, and that such gross mismanagement, if continued, would result necessarily

in insolvency, a receiver should be appointed to manage the corporate affairs during investigation of the charges made in the complaint. (*Hall v. Nieukirk,* 85 P. 485, 12 Idaho 33 (1906).)

(d) Conversion through salaries and expenses.

It is well settled that a court of equity has jurisdiction at the suit of a stockholder to correct abuses of the corporate management by the board of directors, whether by way of unauthorized or fraudulent allowance of salaries for themselves and their confederates, either as directors or officers of the corporation, or by way of appropriating the assets to their own private uses. (*Gettinger v. Heaney,* 127 So. 195, 220 Ala. 613, 1930.) Improper or unauthorized salaries and expense charged by officers or directors of a corporation amount to conversion of corporate property, and are circumstances considered in justifying appointment of a receiver. So, in a suit by minority stockholders to compel an accounting of money and property belonging to the corporation, which the complaint alleged had been fraudulently converted to their own use by the officers of the corporation, who, it was alleged, were continuing to convert its money and property to their own use, as pretended salaries and expenses, without authority therefor, it was held in *Cameron v. Groveland Improv. Co.,* 54 P. 1128, 20 Wash. 169, that a receiver was properly appointed pending the litigation, and that the officers were properly enjoined from interfering with the property of the corporation during the pendency of the action. It was said that, if the facts specifically

stated in the complaint were true, the plaintiffs were entitled to the relief demanded.

It was held, also, in *Boothe v. Summit Coal Min. Co.,* 104 P. 207, 55 Wash. 167 (1909), that a temporary receiver should be appointed for such period as the trial court might fix, within which the differences between the parties might be adjusted by themselves if possible; and that if, at the expiration of such time, their differences were not adjusted, a permanent receiver should be appointed; that an accounting should be had, and excessive salary and profits withdrawn by the president should be returned.

In *Rugger v. Mt. Hood Electric Co.,* 20 P.(2d) 412, 143 Or. 193 (1933, rehearing denied 21 P. (2d) 1100, 143 Or. 225), the court cited with approval 43 ALR 242, and held that the court had jurisdiction to appoint a receiver for a solvent corporation at the instance of stockholders, where it appeared that the majority stockholders and promoters of the company had transferred to it, in exchange for its stock, property at a gross over-valuation, *that excessive salaries were being paid,* that the company had never paid dividends and was in imminent danger of insolvency.

(e) Illegal directors' meetings and lack of annual stockholders' meetings.

The holding of illegal directors' meetings and failure to hold annual stockholders' meeting will be considered as additional ground for the appointment of a receiver in a stockholders' suit. (*Gibbs v. Morgan,* 72 P. 733, Idaho, 1903; *Tulsa Torpedo Co. v. Kennedy,*

268 P. 205, 131 Okla. 159 (1928); *Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co.,* 64 F.(2d) 817, CCA-4, 1933; *Taylor Finance Corporation v. Oregon Logging & Timber Co.,* 241 P. 388, Or. 1925).

(f) Lack of corporate audit or statement.

Failure to provide a corporate audit or statement of corporate affairs and withholding a knowledge as to the corporate condition are additional factors justifying appointment of receiver in a stockholders' suit. (*Tulsa Torpedo Co. v. Kennedy,* 268 P. 205, 131 Okla. 159, 1926.)

(g) Scheme of unfair operations.

Where the facts disclose a scheme on the part of the directors or a majority of stockholders to wreck the corporation and dissipate its assets, the board of directors, who are, as to the stockholders, trustees of the corporation property and affairs, may be deprived of their power, "when, by fraud, conspiracy, or covetous conduct, or extreme mismanagement, the rights of minority stockholders are put in imminent peril and the underlying original corporate entente cordiale is unfairly destroyed." (*Gettinger v. Heaney,* 127 So. 195, 220 Ala. 613, 1930; see also *Tri-City Electric Serv. Co. v. Jarvis,* 185 NE 136, Ind. 1933.)

(h) Mismanagement justifies bringing suit to test matter.

The charge of mismanagement in a stockholders' suit, when supported by evidence, is sufficient to justify appointment of a receiver for the limited purpose

of continuing the suit to test the matter. (91 ALR 666.)

4. AUTHORITIES CITED BY APPELLANTS ARE NOT IN POINT.

An analysis of the cases cited by the appellants shows that they fall into the following categories where the courts have refused to appoint a receiver: (a) Where it is only charged that officers or directors are taking excessive or illegal salaries (*Carey v. Dalgarn Construction Co.,* 130 So. 344, 348, 171 La. 246; *Horejs v. American Plumbing & Steam Supply Co.,* 297 P. 759, 161 Wash. 586); (b) where other remedies are available (*Skirvin v. Coyle,* (Okla.) 94 P.(2d) 234; *Ward v. National Ice Cream Co.,* (Mo.) 246 SW 554; *Kahan v. Alaska Junk Co.,* 189 P. 262, 111 Wash. 39); (c) where receiver is sought to redress past grievances, instead of future injuries (*Piser v. Grand Isle,* 60 So.(2d) 1, 221 La. 585); and (d) where a receiver prior to trial is not appointed until a full hearing is had on the charges made in the complaint (*Litz v. S. L. Knitting Co.,* 80 N.Y.S. (2d) 535; *Rabinowitz v. Steinberg,* 112 N.Y.S.(2d) 758; *Gillies v. Pappas Bros. & Gillies Co.,* 47 A.(2d) 424; *Neff v. Progress Bldg. Materials Co.,* 51 A.(2d) 443; *Riddle v. Mary A. Riddle Co.,* 54 A.(2d) 607; *Wood v. York Railways Co.,* 7 F.Supp. 665.)

On the basis of this analysis the appellees have no quarrel with the general legal propositions for which the above mentioned cases are cited by appellants, but submit that they are not in point in this case, both on the facts and on the issues that are involved.

IV. QUESTIONS PERTAINING TO ENFORCEMENT OF TRIAL COURT'S FINAL DECREE OF OCTOBER 10, 1953 AND ORDER ENTERED MAY 7, 1954, OR PERTAINING TO MATTERS ADJUDICATED BY SAID FINAL DECREE, OR SAID ORDER, HAVING NO BEARING ON THE GROUNDS FOR THE MOTION TO VACATE, ARE NOT IN ISSUE ON THIS APPEAL.

Section I of the "Argument" of this brief has covered the points raised in appellants' brief under their Sections I, II, III and XIII. Section II of our "Argument" covered point IX of their brief, and Section III covered point XI of their brief. This section covers all of their remaining points, namely: IV, V, VI, VII, VIII, X and XII.

It should be observed that appellants emphasize Cash Cole's purported heart attack and subsequent illness, following his testimony on the first day of the trial. The reason for such heart attack can be readily ascertained merely by a cursory examination of his testimony (TR 462-535), showing the various acts of mismanagement, misappropriation of corporate funds and assets, his efforts to hedge, his contradictions, etc.

It should also be observed that appellants' brief is ambiguous as to their concept of "documentation", which apparently refers to their pleadings, such as their cross-complaint lodged in the trial court and motion to vacate; attempts to ignore the testimony of Cash Cole, which testimony would constitute admissions that are binding and conclusive on such party (31 CJS 1173, sec. 381); criticizes the trial court for giving weight to proof submitted by appellees rather than proof submitted by appellants;

contains many reckless statements which can not be supported by the record or the evidence before the trial court, which are so numerous that it is impossible to attempt to refute each. For example, at the bottom of page 53 it is stated without any basis or reference to the record that "Nowell, as clearly appears from the evidence, was well paid by the plaintiffs for his part in the conspiracy." And again at the bottom of page 57 it is stated that the claims of the appellants have been fully explained in their affidavits "and have been set out in detail in the cross-complaint, and never denied and should have been accepted as the truth". The only reference is to TR 103-131, which is their cross-complaint, unsupported by any evidence, and which the trial court did not permit the appellants to file. It is also important to note that there is nothing contained in the "Statement of Case" presented by appellants to support their claim of fraud or conspiracy at the time of the execution of the compromise agreement.

All the matters covered by points IV (p. 38), V (p. 41), VI (p. 44), VII (p. 53), VIII (p. 55), X (p. 58), and XII (p. 75) have no bearing on the question before this court, and it is deemed unnecessary to extend the length of this brief by attempting to analyze and meet the arguments therein contained. All of the findings of fact, contained under these points, and which appellants contend are erroneous, pertain to the enforcement on and after May 7, 1954 of the final decree entered by the trial court on October 10, 1953 and its order entered on May 7,

1954, or pertain to matters adjudicated by said final decree or said order, which have no bearing on the sufficiency of the grounds alleged by the appellants necessary to support their motion to vacate said final decree and set aside the compromise agreement approved thereby. It is further submitted that the facts set out in the "Statement of Case" and heretofore considered in the "Argument" will likewise show that these points made by the appellants have no merit in fact as well as in law.

CONCLUSION.

The appellants have failed to show that the trial court erred in its findings of fact pertinent to the question on this appeal, or its conclusions of law because they had failed to establish any grounds under rule 60 (b) of the *Federal Rules of Civil Procedure* necessary to sustain their motion to rescind the compromise agreement and stipulation embodying the latter, and to vacate the final decree based thereon. They have not shown by clear, cogent and unambiguous proof any fraud, conspiracy, lack of comprehension due to illness, or other grounds recklessly charged by them. Their affidavits containing purported proof of these grounds have been merely argumentative, replete with conclusions of fact and not ultimate facts, conflicting as to matters stated by members of the Cole family, contained much duplicity, frequently made assumptions without factual basis or contained legal conclusions and contained many im-

material matters not pertinent to the issue before the court. The character of these affidavits and the reckless nature of the charges made, as well as the similar nature of their argument in their brief, merely indicate an effort on the part of these appellants to prolong their usurpation of corporate powers and retention of possession of Fairview Manor and collection of the income and profits thereof for as long as possible, as well as to avoid the defaults committed by them under the settlement agreement embodied in the final decree. They seek to accomplish that purpose by prolonging further the litigation herein through reckless and unfounded accusations, not only against the appellants in this case, but also against their former associates and indirectly against all the attorneys that have been involved herein prior to the present attorneys representing said Cash Cole.

Dated May 16, 1955.

LYCETTE, DIAMOND & SYLVESTER,
COLLINS AND CLASBY,
JOSEF DIAMOND,
WALTER SCZUDLO,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

CONTROVERSIES AND CIRCUMSTANCES EXISTING AT TIME OF FILING SUIT, TRIAL AND SETTLEMENT.

1. Inception of Fairview Development, Inc.

Everett Nowell and Cash Cole desired to organize Fairview Development, Inc., for the purpose of obtaining a long term lease upon the land on which the Fairview Manor stands for the purpose of erecting the latter. They were not builders, and did not have the necessary construction ability or knowledge, nor the capital and financial standing to obtain such lease and to build such apartment project. Accordingly, they negotiated with the appellees, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, to undertake the organization of said corporation with them, to secure a leasehold, to obtain an FHA insured mortgage loan of $3,080,000.00 for the project, and to construct a 272-unit apartment project. The individual appellees were unwilling to enter into the project without securing a controlling interest in the corporation, but finally it was agreed that 50 per cent of the stock of the appellee corporation would be owned by Bayview Realty, Inc., and the other 50 per cent of the common stock would be owned by said Cliff Mortensen, Nelse Mortensen and Frank V. Henderson. It was then likewise agreed that control on the Board of Directors would be equal, as evidenced by the agreement concerning said control, more fully indicated in paragraph 5, *post.* (TR 280, par. 4; TR 304, par. 1; TR 21, par. 3, 5; TR

333-334.) It was the credit and financial standing of the individual appellees above named and their construction facilities and ability, which made this project an actuality. (TR 304, par. 1, 6.)

2. Stockholders.

(a) Division of stock.

Said individual appellees at the time of filing this suit each owned 150 shares, or a total of 450 shares of the common capital stock of the appellee corporation. This represented 50 per cent of the voting stock of said corporation. The other 50 per cent of the common stock of the appellee corporation, comprising 450 shares and representing 50 per cent of the voting stock, was owned by Bayview Realty, Inc., or by it and Cash Cole and Everett Nowell, who controlled said Bayview Realty, Inc. (TR 280, par. 5, 6; TR 21, par. 2; TR 304.) There are also 100 shares of preferred stock of the value of $100.00 each, issued to the Federal Housing Administrator, in connection with the procurement of the FHA insured mortgage. (TR 21, par. 2.)

(b) Deadlock.

From the inception of the appellee corporation and the Fairview Manor project, disagreement and dissension arose between the Mortensen interests and the Cole interests, resulting before the expiration of 1951, in a deadlock among the stockholders as to the management and conduct of the corporate affairs. (Complaint, XV, TR 11, par. XV; TR 280, par. 10; TR 317, par. 2, 6; TR 333-335.) No decision or

agreement could be reached between them on various matters vitally affecting the welfare and best interests of said corporation. Since the common stock was evenly divided between the opposing factions, as well as the directorate control, an impasse arose and continued to exist. The existence of this deadlock and dissension was uncontradicted by the opposing affidavits of the appellants.

(c) Settlement.

Although the agreement concerning directorate control (see par. 5, *post*), provides for arbitration, the dissension prevented reference to the Arbitrators. (Complaint, TR 19, par. XI, XII, XV; TR 360.) Unsuccessful efforts to settle the differences existing between the stockholders were made some time prior to the filing of the complaint, and continued thereafter. (TR 317, par. 6.)

(d) Litigation.

The existence of the deadlock and dissension among the stockholders was further evidenced by the costly litigation involving them. (See "Statement of Case", par. 10.)

3. Stockholders' meetings.

No annual meetings of stockholders had been held as required by the by-laws and the articles of incorporation, nor special meetings. (TR 280, par. 7(h); TR 317, par. 5, 15.) The opposing affidavits of the appellants do not contradict this fact.

4. Board of Directors.

(a) Deadlock.

A similar deadlock and dissension existed on the Board of Directors as among the stockholders on matters vitally affecting the welfare and best interests of the appellee corporation and the conduct and management of its corporate affairs. (Complaint, TR 11, par. XV; TR 280, par. 10; TR 317, par. 2, 6; TR 314, 360.) The opposing affidavits of appellants had not contradicted the existence of said deadlock and dissension, but had admitted its existence: By reference to the disagreements that existed among the directorate (TR 21, par. 16, 17, 18, 19; TR 288, par. 4, 5); or by ignoring the existence of the agreement concerning equal directorate control of the corporate affairs (see par. 5, *post*); or by a general statement that meetings of directors were called and minutes kept. (TR 21, par 15.)

(b) Directors' meetings.

Proper meetings of the Board of Directors pursuant to the provisions of the by-laws were not called. Meetings relating to corporate affairs were called and conducted by Cole and Nowell without notice to the individual appellees, contrary to the provisions of the by-laws and the General Laws of the Territory of Alaska. (TR 304, par. 1; TR 21, par. 15; TR 317, par. 15; TR 360.) Thus the Board of Directors' meeting of August 3, 1951 (TR 21, par. 10, 14; TR 290) was a self-serving meeting improperly called, of which the appellees had no notice, and at which Cliff Mortensen

was not present. (TR 304, par. 2.) This is further corroborated by the fact that the agreement concerning management purportedly resulting from said meeting, dated December 1, 1951, was only executed by Nowell and Cole, but was not signed by Cliff Mortensen as vice-president in the place provided for his signature. (TR 295; TR 304, par. 2.)

(c) Board of Directors' meeting, October 29, 1952.

The deadlock and controversy existing between the members of the Board of Directors and the breach of the agreement concerning control by said board of the corporate affairs (par. 5, *post*) is further evidenced by the conduct of the meeting held October 29, 1952. (Complaint, TR 11, par. XV; TR 21, par. 19; TR 304, par. 10; TR 360.) There was a complete lack of harmony at said meeting and recriminations and ill feeling between the members of said board.

(d) Litigation.

A further illustration of the deadlock and dissension existing among the directors is shown by the litigation mentioned in the "Statement of Case", par. 10.

5. Agreement, June 16, 1950, directorate control.

At the inception of the appellee corporation (see par. 1, *supra*) and negotiations, a written agreement dated June 16, 1950, was executed by Cash Cole, Everett Nowell and Bayview Realty, Inc., as the first party, and Cliff Mortensen as the second party, wherein it was provided that the former, collectively, would have one vote on the Board of Directors, and

the latter would have one vote on said Board; and that any action requiring approval of the appellee corporation must have unanimous approval of these two groups.

This agreement further provided that in the event of the inability of the parties to agree on matters affecting the welfare of the corporation, such matters would be referred to Ken Kadow of Juneau, Alaska, for decision, or in the event of his non-availability, then to Roy Sumpter, and that the decision of either of said individuals on such matters, which were referred and were in disagreement, would be binding on all parties to said agreement. (TR 304, par. 1; Complaint, TR 8, par. XI, XII, XV.) The existence of said agreement and the breach thereof by appellants have not been contradicted by their opposing affidavits.

6. Officers.

Deadlock.

The officers of appellee corporation had been unable to agree upon matters affecting the life and corporate affairs of Fairview Development, Inc., just as in the case of the stockholders and the directors. (TR 280, par. 10; Complaint, TR 11, par. XV; TR 317, par. 2; TR 314.)

7. Usurpation of control and possession.

Cole and Nowell usurped control of appellee corporation and the Fairview Manor project. They took possession of said project without authority of the stockholders or directors, and conceived of said project as being their own to be operated for their sole benefit,

financially and otherwise, without recognition of the rights of the individual appellees, then owners of 50 per cent of the stock in said corporation. They had controlled said project for their individual benefit without consulting or advising the Mortensen interests. (TR 304, par. 1; TR 314; TR 317, par. 6, 7, 8.) The following are some of their unauthorized acts, among others: Collection of rentals without proper accounting; payment of salaries and personal expenses; occupancy of apartments without payment of rent and furnishing of said apartments at expense of appellee corporation even to the installation of a bar; payment of expenses and numerous long-distance calls for themselves and their families while visiting outside the Territory; ignoring the articles of incorporation, by-laws and General Laws of the Territory of Alaska concerning the conduct of corporate affairs; incurring extraordinary and capital expenditures; determining corporate policies; refusing to call or hold annual meetings of stockholders; failing to keep proper corporate records and minutes; holding only self-serving meetings of Board of Directors without notice to the Mortensen interests; and incurring numerous legal expenses by unauthorized litigation. (TR 280, par. 7(a)-(j); TR 290; TR 317, par. 2, 12; TR 335-339; TR 551, 435-441, 552, 565, 553, 502-506, 555, 528-532.) The appellees justify their actions on the ground that as officers and directors "and as individuals" (TR 21, par. 11, 12) they have used their best efforts and energy in managing the housing development, and it was necessary that they manage such project. They do not show the grounds for such general justifica-

tion; merely deny the fact that the Mortensen interests had been ignored, or that the project and the assets of appellee corporation were converted to their own personal benefit and use.

8. Unauthorized extraordinary and capital expenditures.

Extraordinary and capital expenditures have been made by appellants without authority of stockholders or Board of Directors given at a properly called meeting or meetings. (TR 280, par. 7(f), 9; TR 21, par. 13; TR 300; TR 304, par. 3; TR 317, par. 2, 4; TR 314.) The amounts of money spent are admitted in the affidavits filed by appellants as "staggering". (TR 21, par. 18; TR 33.) An analysis of the amounts expended appears in the affidavit of Campbell, acting for the first mortgage owner, and the letter attached thereto. (TR 330-348.) Said letter compares the expenditures made at the Fairview Manor project by appellants with that of another apartment project in the city to show how much higher such expenditures are, and admits that some of these expenditures "reflect in some degree the management's philosophy". (TR 345.) It is noted that for the year 1952 the administrative expense per room at a comparable project was $26.89, whereas at Fairview Manor it was $72.19; that the operating expense was $102.13, whereas at Fairview Manor it was $158.04; and that the maintenance expense was $50.60, whereas at Fairview Manor it was $58.34. The total operating expense per room on a comparable project was $181.72, whereas at Fairview Manor it was $288.61. Real estate taxes were more than double on the Fairview

Manor project, with no showing as to any steps taken to cure the situation. (TR 343.) Campbell's affidavit explains the complimentary comment in his letter mentioned in appellants' opposing affidavits (TR 21, par. 18), as indicating from the standpoint of the mortgagee that any improvements "which enhanced the value of the mortgage security were acceptable without giving consideration to the reasonableness of the costs or the necessity therefor."

9. Assumption of corporate functions.

The net effect of the actions of Cash Cole and Everett Nowell had been the management and operation of Fairview Manor as individuals, and the assumption of all of the corporate functions of appellee corporation as individuals, ignoring the requirements and conditions provided in the articles of incorporation, by-laws and the General Laws of the Territory of Alaska, and ignoring the rights, privileges and interests of the Mortensen group and Cliff Mortensen in his capacity as director and officer. Their actions have been unauthorized in most instances, except where self-serving minutes of Board of Directors' meetings have been prepared by them, such meetings having been called without notice to the Mortensen interests or Cliff Mortensen. (Complaint, TR 6, par. IX, X; TR 280, par. 7(f), (g), (j); TR 304, par. 1, 3; TR 314, 317, par. 2, 4, 5, 6, 7.)

10. Unauthorized salaries and expenses.

There had been no authority granted for salaries in the sum of $1,000.00 per month paid to each Cole

and Nowell, and for large personal expenses charged by them to appellee corporation. (Complaint, TR 6, par. IX; TR 280, par. 7(b), (c), (d), (f); TR 304, par. 5; TR 317, par. 2, 4, 13.) Nowell was employed by the Alaska Freight Lines in a semi-executive capacity and devoted a large portion of his time in that employment. He maintained a residence at Seattle, Washington, and spent a large portion of time there on matters wholly unrelated to the affairs of appellee corporation. Cole on several occasions since inception of the project had spent several months at a time sojourning in California and Seattle. Cliff Mortensen, on the other hand, had never drawn any salary as an officer of said corporation, but had spent large amounts of his time in connection with its affairs. (TR 304, par. 6; TR 317, par. 12.) The absences of Cole from the project had required the services of a temporary manager and payment of salary to the latter. (TR 336-337.) Mr. Campbell, the agent for the first mortgage holders, had noted the payment of $200.00 per month to Cole's wife for the apparent purpose of showing apartments, the large number of long-distance telephone calls while Cole and Nowell were "outside", and the furnishings for their apartments charged to appellee corporation. (TR 336-344.) Cole and Newell justify the salaries as officers and directors of the corporation, by action of the Board of Directors on August 3, 1951 (TR 21, par. 14), which meeting appellees have denied as being properly called, or ever receiving notice thereof, or attending the same. (Tr. 304, par. 2.) Appellants denied charging any personal expenses except for traveling expenses and

their own actual expenses while transacting business for the corporation "outside". On May 24, 1951, however, Nowell wrote a letter to Cliff Mortensen pointing out that Cole "will run the place to suit himself and has control of all the funds and can pay himself an exorbitant salary and expenses and the rest of us will be on the outside." (TR 314.)

11. Unauthorized apartments.

Cole and Nowell had taken three apartments in the project without authority and without payment of any rent since the inception of the project. (Complaint, TR 6, par. IX; TR 280, par. 7(c), (f); TR 304, par. 6, 7; TR 317, par. 2, 12, 14; TR 314, 505-506.) Cole and Nowell justified the taking of such apartments as necessary for proper management of the project. (TR 21, par. 15.) See par. 10, *supra,* concerning extended periods of absence by Nowell and Cole from the project.

12. Corporate records—minutes.

Proper corporate records and minutes of directors' meetings were not kept by appellants. (TR 280, par. 7(i); TR 317, par. 15.) References in opposing affidavits of appellants to purported minutes give no proof of notice or proof of such minutes. (TR 21, par. 10, 15.) Minutes which had been kept by appellants were largely of unauthorized meetings and are "self-serving minutes". (TR 304, par. 1, 7.) No accountant's report had been made available since Lofquist was discharged without authority. (TR 304, par. 4; TR 317, par. 15; TR 21, par. 13.) Mr. Campbell notes

that stock records were not available for his examination. (TR 334.)

13. Lack of accounting.

Pritchard & Lofquist, certified public accountants, approved by the directors, were discharged by Cole and Nowell on January 1, 1954, without authority and following the filing of this suit. (TR 304, par. 4; TR 21, par. 13.) There had been no proper accounting since that time or financial reports to the stockholders. Similarly proper corporate reports were not available to the stockholders since the inception of appellee corporation. (Complaint, TR 6, par. IX; TR 280, par. 7(c); TR 314; TR 317, par. 15.) Appellees state that the accountants were discharged to effect economies.

14. Articles of incorporation.

The provisions of the articles of incorporation had not been observed by appellants, and had been violated with respect to the holding of annual meetings of stockholders, control and management of corporate affairs, and in other respects. (Complaint, TR 8, par. X; TR 280, par. 8; TR 317, par. 5.)

15. By-laws.

The provisions of the corporate by-laws had not been observed by appellants, and had been violated with respect to the holding of stockholders' meetings, directors' meetings, transmitting of notices, annual election of directors, election of officers, determination of corporate policies, management and control of cor-

porate affairs, and in many other respects. (Complaint, TR 8, par. X; TR 280, par. 7(h), 8; TR 317, par. 5.)

16. Bayview Realty, Inc.

Cash Cole and Everett Nowell were the officers, directors and stockholders of Bayview Realty, Inc. The latter was to be the owner of 50 per cent of the common stock of appellee corporation. It was entirely controlled by Cole and Nowell. (TR 280, par. 6; TR 21, par. 8.) At the inception of the corporation about June 15, 1950, it was contemplated that the management of the project would be placed in Bayview Realty, Inc. (TR 21, par. 9.) Appellants set out in their opposing affidavits that this was accomplished at a purported meeting of Board of Directors on August 3, 1951, and that an agreement dated December 1, 1951, was executed by appellee corporation and Bayview Realty, Inc. (TR 21, par. 10; TR 290, 295.) Appellees denied receiving notice of such purported directors' meetings or having attended the same, or that the Board of Directors ever authorized said agreement of December 1, 1951, or that the individual appellees in their individual capacities or as stockholders or as directors ever agreed to the payment of any specific sum to said Bayview Realty, Inc., or Cole or Nowell. (TR 304, par. 2.) Examination of the agreement referred to in Cole's affidavit (TR 295—see original) shows the lack of the signature of Cliff Mortensen as the vice-president provided therein. A bond in the sum of $10,000.00 was issued by United Pacific Insurance Company for a term of three

years from October 3, 1951, covering Bayview Realty, Inc. as management agent for appellee corporation. An application for the bond was not completed by Bayview or Cole, although repeated requests for it were made. The cost of the premium was billed on December 20, 1951, to Fairview Development, Inc. Since the application was not completed and a financial statement was not furnished by appellants, the bond was cancelled on April 25, 1953. (TR 317, par. 11; TR 304, par. 10.)

17. Damages.

(a) General.

The actions of appellants had operated to the detriment of Fairview Development, Inc., and the individual appellees as stockholders. Unauthorized salaries had been taken by Cole and Nowell, and personal expenses charged to appellee corporation including numerous long-distance telephone calls, personal furnishings for apartments, including a bar, traveling expenses and other undisclosed expenses. Apartments had been occupied without payment of rent. Extraordinary and capital expenditures in a "staggering" amount had been expended without authority and without provision or determination of how these large amounts would be paid. The mortgage security had been jeopardized. (Complaint, TR 11, par. XV; TR 208, par. 8, 9, 11; TR 329, 317, par. 2, 4, 6.)

(b) Equal protection.

The individual appellees stockholders did not enjoy the equal protection that was granted to them by

the articles of incorporation, the by-laws and the General Laws of the Territory of Alaska, due to the actions of Cole and Nowell, and therefore their rights, privileges and investment were impaired. (TR 317, par. 6, 17.)

(c) Adverse interest of appellants.

It appeared that Cole and Nowell had attempted to create an adverse interest in themselves for the purpose of gaining control and ownership of appellee corporation, and its assets, and to oust the individual appellees as stockholders. They had treated the project from inception as their own and to be handled for their own individual benefit. This had further impaired the credit, security and the assets of the corporation and the investment of the individual stockholders. (TR 304, par. 1, 11; TR 314, 317, par. 4, 5, 8, 9(a).)

(d) Violation of health regulations.

Cash Cole had violated the health regulations of the Territorial Health Department by refusing to chlorinate the water at the Fairview Manor and by drilling a new well without approval of the Department and at a site which the latter had indicated would not be approved. (TR 317, par. 7.)